

Technicolor

1, rue Jeanne d'Arc
92443 Issy les Moulineaux
France

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**Revised rules for the assessment of horizontal cooperation agreements
under EU competition law
Technicolor contribution to the public consultation**

I Introduction

With more than 95 years of experience in entertainment innovation, Technicolor serves an international base of entertainment, software, and gaming customers. The company is a leading provider of production, postproduction, and distribution services to content creators, network service providers and broadcasters. Technicolor is the world's largest film processor; the largest independent manufacturer and distributor of DVDs (including Blu-ray Disc); and, a leading global supplier of set-top boxes and gateways which deliver electronic content to and throughout the home. The company also operates an Intellectual Property and Licensing business unit managing more than 40,000 patents.

As a technology provider supporting its different business activities, Technicolor is involved in research and development, licensing and technology transfer, whilst as a device manufacturer and a service provider, Technicolor contributes to the creation and definition of standards relevant to its industry and also uses technologies and standards developed by third parties.

Technicolor is headquartered in Paris, France, and has facilities throughout the European Union, the Americas and Asia.

Based on Technicolor's experience in the different business segments where it is present, Technicolor welcomes the opportunity to provide comments on the sections "Research and development agreements" and "Standardisation agreements" of the Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements and on 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.



II The Draft Guidelines on Horizontal Cooperation Agreements – Standardisation Agreements

II.1 Summary

The draft guidelines appear to reflect an expectation that current practice in standards bodies results in negative competition effects, in particular concerning the market power of IPR holders associated with the standards development process. The draft guidelines should consider that the tensions between different stakeholders in the standard setting process can be presumed to result in a natural balancing effect with different groups having different incentives which constrain one another. The provided list of stakeholder types needs to be completed with other categories of participants which have so far not been considered in the document; namely sole industrial buyers of standardised products, companies leveraging the standardised technology for their business without developing technologies for inclusion in the standard, and companies with a mix of business models.

Section 7 addresses mainly the risk of anti-competitive behaviour through abuse of IPR by individual companies (i.e. vertical issues) in the frame of standardisation processes, rather than horizontal collaboration issues. This section appears to deal mostly with vertical restriction and abuse of dominant position and provides little guidance about horizontal collaboration within standardisation processes that may lead to competition restriction, which should be the objectives of such horizontal guidelines.

The draft guidelines do not reflect the pro-competitive role of patents, copyrights and standards in the development of the economy and of competition. IPR is highlighted as a risk to competition, although IPR and licensing have strong pro-competitive benefits. IPRs promote investment in innovation, underpin the transfer of technology and also promote dissemination of information which is key to the stimulation of competition, the spread of innovation, and economic growth. It is the protection offered by IPRs that enables innovators to invest, and which provides a framework to make technologies available for implementation through contribution to standards or through direct licensing.

The development of standards incorporating high performance technologies coupled with strong IPR protection of these technologies represent the cornerstones of any long term innovation and knowledge policy destined to fuel the economy as considered by the European Union in its political agenda and specifically EU 2020 which puts innovation and growth at the heart of the European competitiveness as well as the Digital Agenda which emphasize about standard setting, innovation, interoperability.

Such guidelines may discourage these objectives.

Standardisation is a continuous process with additions and improvements; the landscape is not frozen forever. Standards are developed in a competitive environment. They have to prove they are



economically viable to be successful otherwise alternative economically viable standards using alternative technologies are developed. There is never a single standards initiative to address an issue, but always simultaneous competing initiatives which have their respective merits, costs, and benefits, and achieving success relies first on the standard's economic viability. In addition, inclusion of alternative technologies within the same standard promotes interoperability and flexibility (which are European objectives) and also prevents exclusion. Such inclusion should not be prescribed, as IPR holders of alternative technologies tend to be different in such cases.

Ex-ante disclosure requests (IPR, maximum royalty rates, most restrictive licensing terms) will create a huge burden which will delay standards setting relative to global worldwide standards competition, by imposing burdens beyond those required by other geographic areas., These requests will also require actions which are impossible to achieve for companies having a large active patent portfolio and costly and resource consuming for those with modest portfolios. This will render problematic the implementation of some portions of the guidelines. The requirement for ex-ante disclosure of all IPR that might be essential to the standard would be impossible to meet, even in good faith, without a large team devoted to the provision of such disclosure and will be prohibitively expensive with no guarantee of complete coverage, leaving participants open to litigation, whereas non-participants will not be subject to such restrictions.

Ex-ante disclosure will not always result in positive effects on standardisation. In particular, in complex technology areas, ex-ante disclosure of licensing terms has been shown to be counterproductive in practice. Technicolor believes that ex-ante disclosure of licensing terms or maximum royalty rates should not be required as a matter of European law or policy. Therefore, it is crucial that ex-ante disclosure stays as non-prescriptive guidance.

Cumulative obligations of IPR ex-ante disclosure and FRAND commitments are unnecessary, and create burdens which are disproportionate to the intended benefit of preventing patent ambushes. Obligations should be limited to FRAND commitment, and, if such commitment is provided, additional IPR disclosure should not be requested, as it would not provide any additional pro-competitive efficiency.

These guidelines prescribe only one set of very restrictive and cumulative conditions to prevent a potential few cases, ignoring the possibility that alternative and existing sets of rules and policies of standards bodies may also be efficient in preventing IPR issues and in providing a pro-competitive environment, highlighted by the very limited number of existing cases.

Technicolor is not aware of any European standardisation body, in which it is involved, that satisfies currently the complete set of conditions to be able to benefit from the "safe harbour" proposal. Application of such guidelines would be disruptive to standardisation bodies which would be obliged to change their role, their rules, and their procedures if they would seek to adhere closely to the conditions for safety. This would create significant disruption in European standards production

compared to other geographic areas and would have a significant negative impact on the production of European standards and on the European economy.

Standards organizations should remain free to adopt alternative valid provisions which best meet the needs and objectives of their membership and their industrial sector. The Draft Guidelines should take care not to exclude such valid provisions to the extent that they provide for an efficient, successful and pro-competitive environment. It is crucial to not discourage standards organisations from adopting rules and policies which are outside the “safe harbour” to the extent that they provide a pro-competitive environment.

By focusing specifically on potential risks in relation to the licensing of essential IPRs, and particularly in the absence of any acknowledgement of the legitimate interests of inventors and their investors, much less measures to protect those interests, the Draft Guidelines lack business model neutrality. This is in contrast with the Commission’s stated position as proposed in its 2009 consultation on standardisation in ICT: 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

The “safe harbour” conditions proposal presents many restrictions and cumulative conditions which would, if implemented, provide a competitive disadvantage to business models other than those based on royalty free standards by delaying the standard setting process and by forcing the presentation of a standard’s maximum theoretical price.

The overall result is that the proposed guidelines appear to lack business model neutrality, which is in contradiction with European policy.

The guidelines appear to be much too complicated, cumulative, prescriptive and excessive, creating huge burdens, leaving significant uncertainty about meeting full compliance with the proposed rules when implemented, whilst only very limited established case law is provided. 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.

Also, the draft guidelines do not prevent any abuse of dominant IPR position by patent trolls who would remain outside the standardisation bodies and processes but could promote indirectly their technologies through third parties involved in the standardisation process. The burden and unnecessary constraints generated by the “safe harbour” conditions in these draft guidelines may motivate some IPR holders to act in this manner and to stay out of the reach of European standardisation bodies, leading to a less predictable and transparent situation than the current one.



Technicolor 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.

Technicolor also believes that there is need for revision of the Draft Guidelines to address the above points which are also detailed per paragraph in the following section.

II.2 Detailed analysis and specific comments

§ 260: The assumption is made that once one technology has been chosen and the standard has been set, then a barrier to entry is created by which non-selected technologies are definitely excluded from the market. This would be definitely detrimental, but it is not the general case.

Firstly, whereas some technologies may face a barrier to entry after a standard is adopted in order to efficiently address a common industry need, this restriction is significantly outweighed by the benefits to both consumers and manufacturers.

Secondly and in practice, a competing technology is not definitively excluded from the market if it has some economic merit. A standardisation body must choose the technical developments to be included in the standard. This choice will obviously exclude candidate technologies. However, this is as much an opportunity as a problem. The ISO AAC audio compression standard was created initially to outperform the MP3 audio compression format ISO standard (more officially known as ISO MPEG1/2 Audio Layer 3) in terms of compression efficiency. It was also an opportunity for some companies to promote some technologies which were rejected during the definition of MP3 standard. The AAC standard is now widely used, so this argument cannot be generalized.

This example demonstrates that in cases where the development of an alternative is economically viable, then standards employing alternative technologies will be created and the risk of technology exclusion is lowered.

Standardisation is a continuous process with additions and improvements, and the landscape is not frozen forever. Also, standards are developed in a competitive environment: they have to prove they are economically viable to be successful; otherwise, alternative economically viable standards using alternative technologies will emerge.

Thirdly, a standard is not restricted to the use of one single technology, but often includes multiple similar technologies. A standard may choose to use alternative technologies within the same standard framework, in order to provide interoperability and flexibility. This important possibility should not be forbidden as the guidelines seem erroneously to prescribe (comment on §288).



§ 262: The concept of “holding up” users has not been an issue in the vast majority of standards and seems to be the exception rather than the rule. There is little established case law of actual ‘patent hold-ups’ especially in view of litigation and compulsory licensing options available to licensors and growing judicial reluctance to grant injunctions.

Existing standards bodies’ rules and policies have proven their pro-competitive efficiency in providing balanced IPR solutions in most cases. Is it necessary to define broad and prescriptive rules departing from what mostly exists and impacting the whole industry and standardisation bodies to prevent a very limited number of exceptional cases?

A primary issue is exactly what meaning should be ascribed to “RAND” or “FRAND” and which royalties are considered “reasonable” or “unfair”, as all terms remain undefined.

§ 267: This paragraph set the limits of ex-ante disclosure and the fact that a licensing term agreement is clearly not allowed. In this respect, it would be useful to provide guidance on how is it possible to agree on a royalty free standard before the standard is set, when it is forbidden to discuss licensing terms prior to the adoption of the standard (see § 287), and when royalty free standards require all companies, without exception, to agree on the same terms.

§ 270- 274: The underlying presumption of this paragraph – that a “down-stream” company might have a stronger incentive to cross-license IPR than an “upstream” company - does not necessarily hold true. While some companies may initially prefer broad cross-licenses with other IPR holders, this could significantly harm the future viability of a company, and some companies do not broadly cross-license. From a return on investment perspective, it may be perfectly rational to develop license revenue, even when product sales are strong. In the opposite sense, the assumption that any IPR holders will seek to maximize the collected royalties is not necessarily true. Companies will maximize the mix of revenues made of margin on products and royalties, but will not increase the royalty rate to the maximum. Such behaviour would damage the market, discourage the use of such technologies in products, and will damage such companies themselves, by the failure of a market to emerge for products using the standard.

Other categories of industries, based on their business model, are active participants in the standardisation process and should be included in the list: sole industrial buyers of standardised products, companies leveraging the standardised technology for their business without developing technologies for inclusion in the standard, and companies with a mix of business models.

The mix of business model interests within the standardisation body will lead to a balance between the different categories, paving the way for a balanced IPR solution.

§ 275: Assuming the other conditions for a standard body of openness and transparency are fulfilled, this argument appears to not hold true in most situations and environments.



If a technology (patented or not) is included in a standard, then it is included because it is considered by the standards body decision process to be the best suited technology for the purpose at the time the standard is set. At that point, the industry will be locked into *that standard*. As demonstrated in the comment on paragraph § 260, this does not preclude the development of an alternative standard. Industry has always the flexibility to develop alternative standards, if such standards are economically viable compared to the present standards. There is never a single standardisation initiative to address an issue, but always simultaneous competing standardisation initiatives which have their respective merits, costs, and benefits. The industry, in most cases, is therefore not locked in, and does not have to provide significant effort to move away from such standards as competing initiatives are already usually under way.

Additionally, another way to prevent such issues is to clearly allow the insertion of alternative technologies in a standard for the purposes of fostering interoperability (as part of the Union objectives) and provide flexibility. In opposition to § 288, this possibility should not be prevented.

As long as non-blocking standardisation body IPR terms such as (F)RAND are adopted, this is not an issue and allows all parties with the different business models described in paragraphs 270 – 274 to participate with a reasonable expectation of recovering the investment made in setting the standard.

§ 276: If the conditions of the subsequent paragraphs are not fulfilled, this provision suggests that an investigation (“assessment”) of the standards body and its participants could be initiated by the Commission. In such a case, mere participation in a standards body that does not satisfy these conditions might result in such a company having to defend itself against accusations of anti-competitive behaviour. This creates significant legal uncertainty.

§ 278: This paragraph states that there should be no bias for or against royalty free standards. However, the paragraph then refers to the “relative benefits of (royalty free standards) as compared to other alternatives” reflecting a bias in favour of royalty free terms. Thus, the paragraph may be read as suggesting there should be no bias “against” royalty free standards but effectively withdraws support for royalty bearing terms. The opportunity to obtain a reasonable return on investment is necessary to encourage innovation – if standards guidelines discourage this, significant innovation will be likely to occur outside the boundaries of standardisation. In the long term, can we afford to standardise industries around nominally competent technologies while reserving valuable innovation only for product differentiation?

Royalty free standards do not necessarily offer benefits over royalty bearing standards and discriminate against some of the business models explicitly mentioned earlier.

Royalty free is one possibility of FRAND. But royalty free standards basically impose restrictions on companies depending on their business models, because royalty free imposes that any participant must license royalty free (no freedom to do anything else), while FRAND is neutral; it may include



royalty free companies, or royalty bearing companies, without imposing a value and a business model to all participants.

A royalty free model imposes a particular business model to reward investment made in technology: Provision of services to implement the technology. Not all companies have such business models or activities, nor it is possible to implement such a model everywhere. This is a bias towards a particular business model.

In practice, it is impossible to consider that royalty free technology may not have an influence on the decision, as it is known by all participants, in addition to any technical merits.

Technology patents are pro-innovation, providing ecosystems to build upon. The guidelines should reintroduce this consideration.

Considering the last sentence of the paragraph “The standard-setting organisations should also have objective and non-discriminatory procedures for allocating voting rights” , the use of the term “non-discriminatory” should explicitly include “non-discriminatory and IPR neutral”.

§ 280: It does not resolve the problem of external patent trolls which are not members of standardisation bodies and may have a considerable impact on the economics of a developed standard while the binding rules apply only to the standards body membership. In this sense, it discriminates against the members of standardisation bodies.

In contrast, there is no guidance provided on the horizontal misuse of standardisation processes.

§ 281: The requirement 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” is an extraordinarily onerous obligation requiring continuous effort to monitor a standard in light of all current patents as well as all pending applications that “might be essential” to an unknown final standard. For innovative companies actively patenting their proprietary technologies, this obligation seems nearly impossible to achieve. Even in good faith and with significant resources devoted to such disclosure, there is no guarantee of complete coverage, thereby leaving participants open to potential litigation or accusations of non-compliance with drastic consequences, whereas non-participants will not be subject to such restrictions.

Also, there is no mention of any obligation for other participants to restrict the use of confidential information they may have access to as a result of such disclosure.

From a practical point of view, we may only know the IPRs used in the standard once the standard is finalised as standards go through many drafts as new technologies are developed and considered for adoption and then ultimately rejected.



Such rules do not prevent organizations that remain outside the standardisation body from not disclosing anything, and promoting their solutions via third parties. Therefore, this measure does nothing to prevent an external patent ambush or patent troll to act.

Additionally, pending IPR can only include published applications, and given the tendency to file patent applications during the development of a standard, this would not help as most applications would be unlikely to be published before this analysis phase begins.

It cannot be said that standardisation gives the market power, and that there is systematically a risk of abusing market power. Essential IPRs are different from market power.

§ 282: Such an irrevocable commitment could lead to inequities. A company should be allowed to revoke its commitment under certain circumstances (e.g., if another company violates its licensing obligations, reciprocity, defensive suspension, etc.).

§ 281 + 282: It appears that the “safe harbour” proposal requires both to ex ante disclose patents and to make a FRAND commitment. This is redundant, as the FRAND commitment would provide enough safety to avoid any IPR abuse and retention. Knowing the details ahead of the standard approval would not provide any additional useful information to the fact that holders of such IPRs are committed to FRAND for all IPRs under their control. As highlighted in example 2, the disclosure of IPR by itself does not provide any guarantee of access to such IPR, but it is not necessary to know all the IPR used if a FRAND commitment is provided without restriction.

Therefore, § 282 should be enough to prevent any abuses, and would not require 281 application.

§ 283-284: There is no internationally recognized methodology to assess patent value. This is not practicable.

§ 283: The appropriateness of this paragraph lies entirely in the definition of “unfair”, “unreasonable” and “excessive”. The evaluation of these terms is undetermined and is based on the relationship of the fees to the economic value of the patents. Evaluating this economic value based on ex ante and ex post licensing rates is meaningless and unfair because critical information is unavailable.

FRAND is a contract, not a competition law. This is not a one-sided commitment, but a bilateral / balanced agreement among stakeholders.

§ 284: This paragraph suggests that each company with a licensing business might be required to engage independent experts to evaluate the value of a patent portfolio. If this test is used, it could lead to past licensing efforts being judged through the lens of independent experts influenced by present day appreciation rather than judging the license under the rules in effect at the time the



license was created. There is a danger that past licenses negotiated in good faith and at arm's length could be deemed anticompetitive.

The value of the patent should reflect the cost of the research work for its development as well as any comparative assessment.

Comment 94 : add PUBLISHED patent applications

§ 286: The obligation should apply to both the Transferor and the Transferee, and not to only one party, the Transferor, who bears all the risk. The Transferee should also have the obligation to check any existing IPR commitment.

§ 287: Ex ante disclosure of most restrictive licensing terms.

It is difficult to encourage definitively the disclosure of individual maximum royalty rates and to strictly prevent at the same time any, even implicit, joint negotiation or discussion of licensing terms, including royalty rates as the mere disclosure of a royalty rate will induce a similar strategy from other parties in anticipation of future adjustments as according to this paragraph: one party could disclose its most restrictive license terms and other parties could then follow suit and, accordingly, create a de facto price fixing scheme. This could run counter to competition laws. On the other hand, a merely formal requirement "as long as the rules do not allow for the joint negotiation or discussion" is not sufficient to effectively avoid the risk of buyer cartel behaviour inside the standardisation body.

Guidance should be provided to explain how to prevent that individual disclosure would not lead to horizontal discussion and competition restriction.

This method suffers from other drawbacks – for example, it assumes that the IPR is known beforehand. As IPR is developed during the course of the standard setting process, this is a simplistic view of what may happen. The required information and knowledge to propose maximum royalties and most restrictive licensing terms is often not available at that time.

It contradicts § 278 stating there should be no bias for or against royalty free. Standardisation body rules usually state they have not to know about IPR cost. This is in contradiction with standardisation body rules and principles.

The non-prescriptive nature of this recommendation is imperative. However, making such ex-ante disclosure mandatory would discourage or even eliminate European standardisation and associated research in several areas.

Disclosing individual maximum royalty rates would create a competitive disadvantage in favour of royalty free standards, as the addition of individual maximum rates does not represent the future actual price of the standard and may lead to an artificial increase of maximum costs, far above the



real rate to be actually implemented, as IPR holders may not want to unilaterally undervalue their investment from the beginning in anticipation of future adjustments to meet the market price requirement and ensure the success of such a standard.

This may also create significant delays in the setting of the standards, as such disclosure (including most restrictive licensing terms) and subsequent additional adjustments may slow down technical developments until such issues are resolved. Other geographical areas may capitalize on such delays to foster their own standards and subsequently have them recognized internationally.

§ 288: This prevention does not make any sense as the idea is to prevent a standard from becoming all-encompassing. However, SSOs frequently extend standards to include ‘new’ features. As an example, the Blu-ray Disc Association has included new video and audio codecs such as VC1, MPEG 4 AVC and DRA. DVB has included new modulation schemes. Alternative technologies are inserted in standards in order to promote interoperability and flexibility. This is a real improvement and is a way to avoid technology exclusion (§ 260).

This paragraph seems to come from the transfer of technology guidelines about patent pools, and has been directly transposed whereas the context is totally different. The transfer of technology guidelines intended to fix the issue when there is no substitute technology for a particular patent pool (all alternative technologies are licensed by the same patent pool) with the risk of price fixing, as there is no alternative. The context of standardisation is totally different. This paragraph seems to define a standard abuse concept based on set of alternative technologies which would be identical to patent pool abuse. This is totally different, as alternative / substitution technologies in a standard are separately owned, managed and licensed by their respective and different holders, as if they were competing.

This paragraph should be deleted.

§ 290: This paragraph is a safeguard and its conclusion is valid and is welcome. However, the assumption made about the effectiveness of the standard (the larger group to set the standard is, the more effective the standard is) is not necessarily true (see § 301).

Effective standards are also often created with only a small number of industry participants. DVB represents the classic ‘large’ grouping. The Compact Disc represents the classic ‘small’ grouping. Both are successful and widely adopted.

The standard will be applied if it meets a need and is economically viable to implement; not because of the number of industry participants involved in setting it. Many standards have failed because they were primarily uneconomic (for example, the original MPEG4 licensing model) although supported by a large group of companies.



§ 301: As for § 290 the assumption made “appreciable proportion of the industry must be involved in the setting of the standard” is not valid. There could be very large efficiency gains even if there is only a small proportion of the industry involved in the setting of the standard, such as with the example of the Compact Disc.

“The rules of the standard-setting organizations should contain sufficient safeguards to prevent the standard-setting process from being biased towards one or several participants.” This provision is extremely important as experience indicates that wherever such safeguards do not exist or are unclear then problems follow. This is the critical aspect versus the size of the group setting the standard.

§ 305: Compliance and conformity checking are necessary. When a standard is established, ‘independent’ (3rd party or standardisation body members) bodies can be qualified to do this. When the standard is in its infancy OR because the standardisation body decides, then compliance testing is done by the standardisation body because to do otherwise would be uneconomic and there would be no candidates.

§ 306: We do not understand the basis for the statement: “Technology neutral standards are presumed to lead to larger efficiency gains” and the significance of technology neutral standards is unclear, as standards rely on well defined technologies.

§ 317: Example 3: This example raises no issues. However, the videocassette example applies in the phrase “produce other new products which do not conform to the standard”.

As the phrase currently stands, it potentially allows non-compliant products that completely overlook the potential for damage to an existing installed base of equipment that is compliant with standards through the use of non-compliant videocassettes in the same market, leading to increased costs for the consumer and loss of market confidence.

If instead, this was phrased as “other new products which conform to different and competing standards” or “other new products in competition with those based on this standard” it would cover this particular risk.

III The Draft Guidelines on Horizontal Cooperation Agreements – R&D Agreements

III.1 Specific comments

§ 112 & 119: Licensing revenues market share for a given technology is not pertinent given the impact of alternative access to technology. In a technology, there is not only one patent, but usually a set of patents provided by several companies, with various royalty rates. Therefore, it is difficult to compare market share between companies, depending on the number of patents granted, and their respective value (essentiality, ...).



Market share calculation takes future licensing into account. There are many markets with short life cycle products, preventing any precise determination of market share.

IV The Draft Regulation on the Research and Development Agreements

IV.1 General comments

As compared to the current regulation, the draft regulation is significantly more restrictive in both terms of market share limitations as well the requirements for disclosing and sharing intellectual property rights. Notably, intellectual property rights required to be disclosed to obtain an exemption are defined to include industrial property rights, copyrights and neighbouring rights, a scope much broader than simply patents and published patent applications.

Based on the new requests regarding IPR disclosure, or by imposing restrictions on the exploitation of the common results, including IPR, the draft regulation may discourage collaborative R&D in Europe, while public authorities are promoting such collaborative R&D to leverage European competitiveness, to cross fertilize industry and academic and to spread innovation across Europe and territories.

IV.2 Specific comments

Recital 12: “There is no practical possibility to determine prior to the research and to its achievement which IPR will be needed for the exploitation of the results as it is further explained in the comment of Article 3 § 2. Open and transparent” terms should be defined.

Article 3, paragraph 2: The condition stated in this article : *“The parties 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.”* requires that the parties make a full disclosure of all relevant background IPR, including copyrights, neighbouring rights, and trade secret information or any practical information relevant to further services or manufacture pursuant to the definition in article 1. It would require considerable inquiry to identify such IPR, and usually, entities involved in the in collaborative projects do not always have a precise idea of the extent of their relevant background IPR.

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.

Additionally, such an IPR disclosure rule would be 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 is i) a strict



requirement to disclose rather than the ETSI requirement to use reasonable endeavours, ii) there is no indication that the Draft Regulation does not require the Parties to conduct patent searches, unlike ETSI's rules, and iii) 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; for example, because it might be desirable in certain circumstances to define the standard so as to avoid essential IPR where no FRAND licensing declaration has been made.

However, collaborative research and development does not result in the setting of a standard and it is therefore surprising that the IPR disclosure rule should be more onerous, as the draft regulation already requires "access" to allow all participants to exploit the results of the collaboration (article 3 §3).

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 and will strongly discourage it.

Article 3, paragraph 4: The draft regulation stipulates that each party must be granted access to any pre-existing know-how of the other parties if it is indispensable for exploitation of the results of the research when current regulation only requires that parties must be free to exploit pre-existing know-how. The new test adds a burden to each party.

The current 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 draft regulation would require "equal access" and does not allow for the field of use restriction.

We consider this change as unnecessary.

Participants should not be discouraged from devising 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 article 3 §3). This means that asymmetrical treatment of IPR will most likely be unavailable although that is sometimes favoured and necessary, as for example for the active exploitation of IPR through licensing and prevent full exploitation of European IPR.

We suggest to keep the field of use restriction possibility in this article and to keep the current article wording.
