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European Commission
Directorate-General for Competition
Antitrust Registry
Ref.: HT.1407
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

By post and email: comp-greffe-antitrust@ec.europa.eu

Dear Sir/Madam,

Ref: HT.1407

On 4th May 2010 the Commission published for consultation drafts of a revised Research and Development block exemption, Specialisation block exemption and Horizontal Co-operation Agreements Guidelines (the "Guidelines").

We write with particular reference to the draft Guidelines on standardisation at Section 7.

We have reviewed the suggestions set out in the Guidelines, mainly at paragraphs 278-290, and in the main TomTom supports the Guidelines, and the goals that they seek to achieve.

In addition to the draft proposals set out in paragraphs 278-290, we wish to make the following additional comments and submissions:

1 Detailed licensing terms

We consider that there should be an obligation for companies participating in the standards setting process to declare the substantive details of their intended licensing policy so that the Standard Setting Organisation ("SSO") can decide whether to adopt the standard based on better knowledge of those anticipated licensing terms.

The detail of the licensing terms should in our view include:

- the royalty rates for essential patent licensing including whether it is proposed to be a fixed price per unit or a percentage royalty;
- if it is an *ad valorem* (i.e., percentage royalty), then the company should disclose:
 - o the basis upon which the royalty is to be calculated;
 - o whether there is to be a maximum monetary amount of royalty (i.e., a cap);
 - o whether there is a minimum monetary amount of royalty (i.e., a floor)
- any territorial restrictions that may be imposed;
- any branding restrictions that may be imposed;
- any grant-back requirements;
- the types of products which will, and will not, be licensed.

2 Principles of FRAND patent licensing

We believe that the IPR Policy of an SSO should state some key principles of what FRAND (Fair, Reasonable and Non-Discriminatory) licensing means in the context of the standard which is being agreed.

Fair and Non-Discriminatory

Declarants should declare what market level they intend to license, and what market levels they will refuse to license.

FRAND should not mean that a patent holder can license market participants at certain market levels, but refuse to license market participants at other market levels.

FRAND should not mean that a patent holder can require licenses for sales of end-products in the value chain, and yet grant licenses at the same *ad valorem* rate but with a relative lower actual cost at other levels of the value chain.

We consider that a key principle of the policy should be to ensure that buyers of components which must use essential patents have commercial freedom to choose which suppliers they want to use at any market level.



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Reasonable

We believe that the royalty must reflect the value of the contribution of the essential patents to the relevant parts of the end product which is being sold.

For example, there may be a wireless module which is built into a laptop computer, and an essential patent which relates to the transmission of data in the wireless module. Given the limited functionality of the wireless module as compared to the functionality of the product as a whole, it is not reasonable for the essential patent holder to seek charge *ad valorem* royalties on the ultimate selling price of the laptop computer, while at the same time charging substantially lower real monetary royalties to vendors who supply the wireless module on its own.

If the essential patent holder intends to charge license fees only at the end-product level, then this fact should be clearly stated during the standard setting process, together with the relevant licensing terms (see paragraph 1 above) so that there can be commercial certainty with respect to the implementation cost of the standard.

3 Maximum cumulative royalty

We believe that steps should be taken to ensure that there is a maximum cumulative royalty that will be payable, irrespective of the number of patents or patent holders, for all essential patents used in a product which meets a standard.

4 Independent assessments of declarations of essentiality

We believe that steps should be taken to ensure that there is an independent assessment by the SSO to determine whether a patent is essential to a particular standard, and which part of the Standard.

Further, any declarations of essentiality by participants should:

- specify the claims of the patents that are declared to be used by the standard, and

- declare whether the particular section of the standard is mandatory or optional.

5 Abuse of the process

We consider there should be an obligation on SSO's to provide in any IPR Policy that members of the SSO cannot withhold information regarding the relationship of their IPR rights to a proposed-standard and subsequently seek excessive fees for use of any essential patents. We recognise that there may be an issue as to what level of fees is reasonable, but fees substantially greater than those charged by other holders of essential patents in the standard setting should be regarded as questionable and potentially abusive.

Any IPR Policy should state that it is incumbent on the members of the SSO to take affirmative steps to search their patent portfolios to ascertain whether they have essential patents that relate to the proposed standard. This search should take place, irrespective of whether the member has contributed to the particular standard.

Any IPR Policy should provide that it will be an abuse of the IPR policy for a member to seek license fees for essential patents where the patent holder has participated in the standard setting process and where the patent application arises out of the standard in respect of which the patent application was made.

6 Assignment and licensing requirements

We consider any IPR Policy should oblige members to require assignees, or licensees with enforcement rights, of essential patents, where the assignment or license is subsequent to the publication of the draft standard to be bound by similar obligations to license on FRAND terms and at comparable rates.

7 Defensive Use of Undeclared Patents

We recognise that a complete review of a large patent portfolio may be burdensome for some participants in standard setting. Therefore one possible exception to the usual restrictions on undeclared essential patents should be the ability of a holder of such patents to counter-assert such patents in licensing



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negotiations and in countersuits in response to patent assertions in the same technical field as the standard.

8 Substantial Industry Participants not members of SSOs, who Withdraw from An SSO, or who Participate through Proxies

One area of concern is the role of substantial participants in an industry who, cognizant of a standard's direction choose to absent themselves from the SSO, or withdraw prior to being required to make FRAND commitments, or who manipulate the standards process by proxies, i.e., participants with whom the industry participant has a relationship. A sensible policy needs to address such potential remote abuses of the standards creation process.

9 Declaration of FRAND commitments

We consider that the IPR policies of SSO's should require participants to declare more openly what their FRAND commitments are:-

- (a) in advance of the standards process commencing; and
- (b) prior to the formal adoption of the standard.

In our view, this is necessary to give better commercial certainty so that industry can understand what the costs to third parties will be of making products that meet the standards.

We further consider that IPR holders should warrant to all licensees that their licensing terms (a) are FRAND and (b) comply with the relevant standards to which the license relates.

We thank you for your attention, and should be grateful if you could acknowledge receipt.

Yours faithfully

TomTom N.V.