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I. INTRODUCTION

This brief commentary focuses on the section on Standardization Agreements in the *Draft Guidelines* (mainly paragraphs 269 - 290). While it is important to honor the intellectual property rights ("IPR") of participants in the standard-setting process, it is also important that the process is transparent and the members of the standardization agreement are aware of the likely cost of the technical choices when deciding among technologies during the standard-setting process. Also, to promote innovation and economic development (one of the stated policy goals of the Europe 2020 initiative), the standard-setting process should be geared towards identifying the "best in breed" technologies irrespective of the existing market position of the various companies participating in the standard-setting procedure.

II. THE STANDARD SETTING PROCESS MUST PROMOTE REAL TECHNICAL DEBATE

The adoption of a standard is very likely to create or increase the market power of those companies whose IPR is included in the standard. As these companies in many cases collect royalties for the use of their IPR, they have an inherent economic incentive to spread the use of the standard as widely as possible. When the standard competes on the merits, and gains market acceptance because of its technical merits, it does not raise any competition concerns. However, if members of a standard-setting organization ("SSO") use other means to foreclose competition, such as using the standard as part of a broader restrictive agreement aimed at excluding actual or potential competitors, the conduct is likely to restrict competition by object and thus fall under Article 101(1). As an example of this the *Guidelines* (paragraph 266) describe a national association of manufacturers that sets a standard and then puts pressure on third parties not to market products that do not comply with the standard.

The *Guidelines* should recognize that pressure to foreclose competing technologies (and products that use the competing technologies) could take many forms. For example, as the validity of the underlying IPR is a key factor for the adoption of almost any technology, any unfounded suggestion that competing technologies (and products that use the technologies) do not contain valid IPR is likely to create uncertainty in the market and seriously undermine the adoption of a competing technology with the resulting foreclosure effect.

The Commission correctly recognizes that IPR holders can abuse their market power as part of the standard-setting process. The Commission's discussion of Article101(1) in paragraphs 277-280 may, however, somewhat oversimplify the workings of a typical SSO. It is important that an SSO have "unrestricted participation," as the Commission points out. That participation, however, should not be merely *pro forma*. The standard-setting process must promote real

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technical debate among different alternative technologies. The standard-setting process should be a real opportunity for different technical solutions to be assessed from a broad range of viewpoints. Different technical solutions should compete on the technical merits in the review process as this maximizes the chances of identifying the "best in breed" technology.

As the Commission correctly points out, the adoption or promotion of one standard by a horizontal consortium inevitably leads to the demotion of a competing technology. Consequently, and absent sufficient safeguards, a standard-setting process may at its face have sufficient participation by stakeholders but in reality facilitate the promotion of inferior standards favored by strong market participants with seriously negative market effects. Accordingly, it would be prudent to assess whether the entire technical review process of the standard-setting body produces standards that are the result of a healthy technical competitive landscape—or whether it merely reflects proxies for the existing market power.

III. MORE INFORMATION EARLY IN THE STANDARD-SETTING PROCESS PROMOTES TRANSPARENCY

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

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

IV. ROYALTY AGREEMENTS SHOULD TRAVEL WITH ESSENTIAL PATENTS

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