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Contribution to DG COMP Evaluation of Block Exemption Regulation for Horizontal Cooperation Agreements

4iP Council is an organisation made up of 24 supporters and ecosystem partners, whose aim is to develop high quality academic insight and generate empirical evidence on topics related to intellectual property and innovation. Patent rights are where the main competence of 4iP Council research has focused, including on research & development and standardisation.

We wholeheartedly support that the current consultation should seek to deliver a high-quality evaluation of whether the existing guidance regime requires updating or not. In the context of the Evaluation, 4iP Council wishes to make the following points specifically relating to the Chapter on standardisation in the Horizontal Co-operation Guidelines (HCG). We have referenced our research as relevant.

1. **Innovation is a geo-political issue**; indeed, those sectors or technologies identified by President-elect Von Der Leyen[1] i.e. blockchain, high performance computing, algorithms, and data-sharing and data usage tools, as well as defining standards for 5G networks and new generation technologies are heavily reliant on complex technologies, risky upfront investment in R&D and indeed standardisation, if they are to achieve economies of scale and network effects. These technologies, and the investments that enable them, are usually protected by the intellectual property system. In addition, these sectors are deemed critical to ensuring technology sovereignty and autonomy[2] which would imply that, in exercising its prioritisation discretion, DG Competition should bear these overriding issues into account.[3] Unless there is clear evidence of abuse, based on sound evidence and theory, DG Competition should prioritise policy coherence. For this reason, engaging with colleagues in the Commission would be critical during this review.

2. The European Commission should ensure that its evaluation creates a framework to assist European standardisation to develop the best solutions. Competition policy should support this objective, notably by not undermining the positive aspects of European standardisation, led by European Standards Development Organisations. The HCG should support this. In reviewing the HCG, it is important that the resulting guidance does not cause revolution in standardisation policies.

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[1] See Mission Letter to Internal Market Commissioner-designate Sylvie Goulard and to Executive Vice President Designate for a Europe fit for the Digital Age, Margrethe Vestager.

[2] See e.g. les Amis de l'Industrie, 18 December 2018, referring to automotive connectivity, batteries, energy systems, the Internet of Things, robotics, Artificial Intelligence, defence, space and the bio economy) that notably overlap with sectors which fall within the scope of Art. 4 of the EU's new foreign direct investment regulation.

[3] For example, the European Political Strategy Centre Paper EU Industrial Policy After Siemens-Alstom: Finding a New Balance Between Openness and Protection highlights how Chinese industrial policies have sought to seek to control key aspects of the development and implementation of 5G, with centrally orchestrated strategies leading to increased activity in the international standard setting bodies developing 5G standards (i.e. 3GPP or ETSI), to the filing of patents, to the sale of equipment. Huawei has become the leading global telecom equipment vendor leader far outstripping Nokia and Ericsson (See ESPC Paper (2019), page 13) This undermines the ability of innovative European companies from contributing to the development of 5G standard evolutions and runs counter to the core interests of the EU. If the EU seeks to foster European companies to invest in the evolution of 5G, unravelling the licensing system of standard essential patents risks driving EU companies out of that foundational layer of the value chain. It will result in European companies being buyers of technologies not inventors.

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3. This phase of evaluation is important to ensure that the HCG are principally based on a **solid legal, empirical foundations** necessary to provide guidance and legal certainty. The Consultation process should provide the Commission with a deep understanding of the functioning of standardisation, based on sound research. It is only against this background that concerns or theories of harm can be tested. Research help the Commission to understand if there is in fact an actual problem that needs to be addressed; it can then help to quantify and define the true extent of that problem, based on real-world examples and empirical data, and then to assess a proportionate solution, that avoids unintended consequences.[4] These steps are the foundation of sound policy-making.

4. The underlying principles of HCG, to create a safe harbour for Standards Organizations (SOs) and their participants, in order to avoid or prevent possible exclusionary effect from occurring. If SOs and participants are to undertake self-assessment with any certainty, **the HCG cannot contain controversial elements** that undermines the self-assessments. This would not exclude the Commission from testing such theories through case law. The evaluation should seek to eliminate contentious theories. We make this point because over the last two decades there has been much theorizing about potential antitrust harm in the standardisation context, yet comparatively little agreement on these theories or even case law. One obvious area of current contention is whether there is evidence that the FRAND commitment requires access to the standard or an access to a license. This is an area where further evidence is needed in order to establish whether exclusionary effects are occurring, whether legal principles are sufficiently clear to be incorporated into guidance and whether the ramifications are proportionate.

5. There needs to be an **appropriate weighting for the consultation**. It will logically be the case that technology contributors will tend to be far outnumbered by standard implementers. As a result, one would expect many more responses to the consultation from the users of standards than those that take part in standards development and even less from those who develop the technologies contributed to standards. It would therefore be unbalanced to take a simple proportionality or quantitative approach to assessing responses on that basis, because the impact on the development of technology solutions would be significantly undermined.

6. An increase in understanding is positive, as the rules and policies governing standardisation, as well as the development of standards, have increased in complexity. The HCG aims to provide certainty on the standardisation process as relates to the application of Art 101(3). Certain non-EU SOs have seen significant IPR rule changes that have resulted in an identifiable reduction in the efficiency of that SO.[5] In particular any revision of the HCG should seek to reduce the danger that the standardisation process or rules are used to exclude participants, or to undermine the efficient functioning of standardisation.

7. The current HCG recognize the **tension between different business models**. However, it may not be the case that companies seeking to contribute and/or to select a technology solution or standards are strict competitors, but rather that different non-rivalrous levels of the value chain are involved. The selection of technology may therefore in itself complicate an Art 101 analysis, especially if this affects competition analysis on the downstream market. The Commission should undertake a rigorous exercise to assess the future impact of industrial

[4] See 4iP Council's "Principles for Research in Patent Markets".
[5] See Kirti Gupta, Georgios Effraimidis "IEEE Patent Policy Revisions: An Empirical Examination of Impact" May' 18 and Keith Mallinson "Development of innovative new standards jeopardised by IEEE patent policy" Sept.' 17

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policies to understand both the intended and unintended impact of policy choices on the whole ecosystem and value chains.[6]

8. Revision of the HCG to expand into the area of Art 102, notably relating to licensing conditions, is unclear especially where controversial theories are involved.

9. The Commission is right to review the **effectiveness of the current system**. One way of doing so is to see whether the adoption of the current HCG resulted in significant reforms in SO practices. From a cursory review, it would appear that there were some incremental changes (e.g. ensuring the transferability of the FRAND commitment) but in general the HCG did not result in a radical overhaul of the functioning of SOs. This would imply that the HCG reflected current practice. This is positive as the HCG do not, and should not, seek to change SO's standardisation policies unless there is concrete evidence for change. The HCG are not the appropriate vehicle to drive SOs practice.

[6] Indeed, as academic research shows that implementing companies may seek to use regulatory uncertainty to engage in commercial scale infringement and in particular, in the standardization context. See Bowman Heiden and Nicolas Petit, Patent Trespass and the Royalty Gap: Exploring the Nature and Impact of "Patent Holdout", August 2017. Accessible here.