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Permanent Representations of Member States
to the European Union

Brussels, 23 June 2022

Re: The need for strong, effective, and even clearer Horizontal Guidelines to protect open standards and fair, reasonable, and non-discriminatory licensing

Dear Intellectual Property Attaché,

The undersigned associations write to you concerning the draft revised version of the *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal co-operation agreements (Horizontal Guidelines)* published by the European Commission (EC) on 1 March 2022. We want to highlight the importance of competition law in promoting a robust European innovation ecosystem and ensuring a balanced framework for the licensing of standard-essential patents (SEPs). Collectively, we represent both large and small businesses, employing 6.5 million people, across Europe, with some members reaching more than 180 countries globally and generating annual revenues of more than EUR 2.2 trillion. In aggregate, our members spend more than EUR 175 billion on research and development (R&D) and innovation across a wide range of industries, including EUR 57.4bn in the automotive sector. Contributing to 28 per cent of the total EU spending on R&D, the automotive sector is Europe's number one investor in innovation. Further, our members own hundreds of thousands of patents, including many SEPs. They both develop and use standards and innovate on top of standards to create products and services that are widely used across the European economy.

The *Horizontal Guidelines* are crucial to a healthy and fair standards ecosystem and to preventing abuses related to SEP licensing. Such abuses dramatically undermine innovation across several EU industries, ultimately harming European businesses and consumers.

Businesses have long relied on the *Horizontal Guidelines* to facilitate inter-company cooperation in ways that are economically desirable and do not negatively impact competition or violate competition law. The EC's objective in reviewing the parts of the *Guidelines* that address standardization is to ensure they protect competition and provide adequate legal certainty to companies entering into standardisation agreements under EU competition law under *Art. 101 of the TFEU*.

While standard-setting has many pro-competitive effects, we agree with the Commission that *'[s]tandard-setting can, (...) also give rise to restrictive effects'* (§ 264). To preserve a level playing field in light of new market developments such as digitisation and the pursuit of sustainability goals, it is more important than ever that the Commission maintains a strong, clear, and robust

enforcement framework for stakeholders to continue developing innovative technologies using open standards.

The revised version of **Section 7** of the *Horizontal Guidelines* offers helpful guidance as to whether and when standardisation agreements comply with competition rules. In particular, we endorse:

- (i) the inclusion of ‘undertakings that acquire technologies with the purpose of licensing the[m]’, i.e., **Patent Assertion Entities (PAEs)** as upstream undertaking in §469, considering a large share of litigation – and consequently of litigation costs – in the EU is driven by such entities;¹
- (ii) the introduction of an obligation to **update the disclosure** as the standard develops and when the standard is adopted
- (iii) maintaining the wording that ensures effective access to the standard requires offering licenses to **all third parties** on FRAND terms (§ 482)
- (iv) the view that the **valuation method** has to be based on the individual SEP’s own technical merits and scope and should be irrespective of the market success of the products, which is unrelated to the patent technology (§ 486);
- (v) the importance placed on **transparency and stakeholder representation** as tools to promote efficiency gains in the market and adequate levels of competition.

A report commissioned by the German Ministry of Economic Affairs and Energy notes that there are already more than 21,571 patents declared essential to 5G-NR technical standards.² As 5G networks come online across the European Union, certain patent holders continue to refuse licences to willing licensees because they are located higher in the value chain. As the Commission reviews the *Horizontal Guidelines* and evaluates which areas may need confirmation and further strengthening, it is important to consider new market conditions and realities like 5G and the related IoT developments. Therefore, to ensure a fair and balanced licensing environment, we urge the Commission to further revise the *Horizontal Guidelines*, in particular by:

- (i) carefully reassessing the introduction of ‘**patent hold-out**’ into the *Guidelines*, due to its low pertinence from an EU competition law perspective (§ 470). We caution the Commission against casting hold-out as equivalent to hold-up in this document since SEP licensees cannot occupy an exclusionary gatekeeping position as SEP holders do;
- (ii) reinforcing that the **FRAND commitment** requires offering licenses to any willing licensee on FRAND terms, **regardless of where they are in the value chain** (§ 482);
- (iii) limiting the seeking of injunctions and other exclusionary remedies by FRAND- committed SEP holders to rare circumstances and only where FRAND compensation cannot be addressed via adjudication, e.g., lack of jurisdiction or bankruptcy;
- (iv) specifying that neither party to a FRAND commitment should force the other into **unreasonably extensive secrecy arrangements**;
- (v) acknowledging that a refusal to enter into ‘**Alternative Dispute Resolutions**’ is not a sign of unwillingness. We caution the Commission against using ADR as an encouraged resolution tool among the parties, as this runs against the core objective of achieving a transparent licensing framework;³

¹Darts-ip, NPE Litigation in the European Union: Facts and Figures (February 2018), available at <https://clarivate.com/darts-ip/campaigns/npe-litigation-in-the-european-union-facts-and-figures/>

² <https://www.iplytics.com/general/industry-experts-5g-patent-study-berlin/>.

³ Brian J. Love & Christian Helmers, Are Market Prices for Patent Licenses Observable? Evidence from 4G and 5G Licensing, Working Paper (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4020536

- (vi) explaining that a party is not to be considered unwilling for challenging essentiality, validity, and infringement of SEPs and that courts should not impose **global portfolio licenses** against licensees without the consent of the parties;
- (vii) increasing the **minor reference to SMEs** within the *Horizontal Guidelines*, to achieve the goal of wider representation and inclusion of stakeholders in the new text, in accord with the Commission mentioning such efforts in the Inception Impact Assessment published in June 2021;
- (viii) reinforcing the point that patent pools are among the entities that are bound to the FRAND commitment without exception, for example, by inserting across-reference to paragraph 261(e) of the European Commission *Guidelines on the application of Article 101 of the TFEU to technology transfer agreements (Technology Transfer Guidelines)*. Since patent pools, in most cases, do not own the patents and the patent pool administrator instead acts as an agent on behalf of the patent holders contributing to the pool, pools cannot be used as avenues to skirt a patent holder's FRAND commitment.
- (ix) Further clarifying that patent holders contributing to a patent pool must make an individual license available to its SEPs separately from the pool if requested to do so, in line with paragraphs 261(d) and 270 of the *Technology Transfer Guidelines*.

The CEN CENELEC Workshop Agreement (CWA) 95000:2019 (*Core Principles and Approaches for Licensing of Standard Essential Patents*)⁴ provides further context and support for these principles. More than 50 industry organisations that build innovative products and bring standardised technologies to the market developed and supported these licensing principles and best practices. The document (a) provides contextual information regarding SEP licensing, the application of FRAND and related competition law considerations, (b) identifies and illustrates some of the questions that negotiating parties may encounter, and (c) sets forth some of the key behaviours and 'best practices' that parties might choose to adopt to resolve any SEP licensing issues amicably and in compliance with the voluntary FRAND obligation.

We urge the [Permanent Representation/Government agency] to consider these points in its input to the European Commission on the revision of the *Horizontal Guidelines*. We thank you in advance for your consideration of our concerns. We remain available to discuss any questions you may have, and we look forward to engaging further in the future.

Sincerely,

Signatories

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⁴ CEN CENELEC Workshop Agreement 95000, *Core Principles and Approaches for Licensing of Standard Essential Patents* (2019), [ftp://ftp.cencenelec.eu/EN/News/WS/2019/CWA_SEP/CWA95000.pdf](http://ftp.cencenelec.eu/EN/News/WS/2019/CWA_SEP/CWA95000.pdf).