InterDigital's observations on the draft revised Horizontal Guidelines

About InterDigital

1. InterDigital, Inc ("InterDigital") is a US research and development corporation founded in 1972 with headquarters in Wilmington, Delaware and research centres in France, the UK, Canada and the US. It is engaged in the development of foundational wireless and video communications technologies and derives its income from the global licensing of products implementing those technologies.

2. For 50 years, InterDigital has been a pioneer in mobile technology and a key participant in and contributor to global cellular and other wireless standardisation. It is also a key contributor to global video standards, conducting research in video, augmented reality, immersive content, and artificial intelligence technologies. In June 2019 it reinforced that work with its acquisition of the research arm of Technicolor.

3. InterDigital does not manufacture devices; instead, it focuses on innovation through advanced research, often collaborating or partnering with other research-focused organisations on specific projects. In particular, InterDigital is regularly selected as a research partner in collaborative projects funded by the Horizon Europe programme. Since 2000, InterDigital has invested more than 1.3 billion USD in research and development. Those R&D efforts have resulted in critical inventions covered by a portfolio of approximately 27,500 patents and patent applications, spanning some 50 jurisdictions worldwide.

4. InterDigital creates the technology on which it secures patent protection: over 90% of its cellular wireless and video inventions were developed in-house by its engineers. In order to continue to fund its research and development efforts and its participation in the development of wireless, video and other standards at various standards development organisations (SDOs), InterDigital licenses its worldwide portfolio of patents covering its inventions. Many of the most prominent technology companies globally that are active in making wireless and other consumer electronics products implementing standardised technology have recognised the strength and quality of InterDigital's patent portfolio and entered into licences for InterDigital's SEPs. Among its current and past licensees are companies such as Apple, Asus, Samsung, Sony, Ericsson, Google, Nokia, Panasonic, RIM/Blackberry, HTC, Huawei, LG Electronics, Pegatron, Wistron, Sanyo, NEC, Sharp and, recently, Xiaomi.

5. As an innovator of such foundational technologies, as an active participant in and contributor to standardisation of digital technologies, and as a licensor, InterDigital has a keen interest in ensuring the successful implementation of digital technology standards in new markets, such as the Internet of Things ("IoT"). While 5G is still being rolled out, InterDigital is already a leader in research for 6G. InterDigital was recently recognised for its contributions to wireless and video standards in the LexisNexis Innovation Momentum 2022: The Global Top 100 report

6. InterDigital has previously (on 5 July 2021) provided feedback to the European Commission under its Inception Impact Assessment on the Horizontal Block Exemption Regulations and Guidelines, which is available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13058-Horizontal-agreements-between-companies-revision-of-EU-competition-rules/details/F2661336_en

Summary of main points

7. InterDigital provides feedback on the proposed amendments to the Horizontal Guidelines from the perspective of a research and development organisation which contributes to open standardisation at many SDOs, and as a licensor of standard essential patents for its innovative technologies.

8. Following up on its previous feedback on the Horizontal Guidelines submitted on 5 July 2021, InterDigital welcomes some of the amendments to the Horizontal Guidelines now proposed by the Commission. In particular it notes:

   - Recognition that the standardisation process involves further collaborative development of the solutions proposed by contributors, implicit in the term "standards development organisation" (SDO) now used throughout;
   - Reference to the problematic phenomenon of "hold out" at paragraph 470;
   - Recognition, at paragraph 484, that investment in R&D for standardisation is risky, and that the opportunity to obtain a reasonable return on that investment is important for ensuring that the best available technology is contributed to the standard;
   - The recognition, at paragraph 488, of alternative methods of dispute resolution, including arbitration;
   - Renewed emphasis on the importance of ensuring that participation in the standard development process is open, at paragraph 493; we further observe that this should be extended to encompass open participation in the development of the IPR policy of an SDO.

9. The main points we make below are these:

   Chapter 4

   - We are very concerned that the new concept of licensing negotiation groups (LNGs) has been added to the treatment of purchasing agreements without any apparent consideration of the many ways in which the legal context and the economic forces at play in licence negotiations differ from other markets.

- As the Guidelines do not take into account the fundamental differences between LNGs and joint purchasing groups, and in particular that LNGs could, in some circumstances, lead to all or nothing bargaining postures that would result in sub-FRAND royalties or a concerted hold-out situation, we believe that reference to LNGs in Chapter 4 is unwarranted and possibly ill-conceived, and should therefore be dropped.

Chapter 7

- Blanket disclosure policies of SDOs should not be disfavoured, as they may be an efficient mechanism for ensuring that SEP holders will license all of their SEPs on FRAND terms and conditions.

- Provisions permitting restricted access to standardisation should be avoided, or kept as narrow as possible, and the competitive concerns with restricted-member Special Interest Groups should be reflected in the Guidelines. It is also important to have open access and consensus-based policies with regard to the development of an SDO's IPR policy.

- The Horizontal Guidelines are not an appropriate context in which to further describe methods of FRAND assessment.

- Ex ante disclosure of an accumulated maximum royalty rate by individual IPR holders may be permissible. However, ex ante disclosure of a maximum accumulated royalty rate by a group of implementers of a standard acting in concert, or by an SDO that does not adhere to consensus-based decision-making on IPR policies, threatens to lead to a buyer (licensee) cartel or a concerted agreement to refuse to take a licence at a rate that exceeds a proportionate share of such a maximum accumulated royalty rate. Such concerted action could harm innovation incentives and reduce the quality of future standards to the detriment of all consumers and to market competition, in contravention of Article 101(1).

- It should be made clear that SDO IPR policies that mandate royalty-free licensing do not fall within any safe harbour and will be subject to careful scrutiny to determine whether such policies may have the effect of excluding competition or distorting market competition.

License to all

- There is no legal basis or a clear theory of competitive harm that would support a “license to all” requirement for all SDOs as a matter under Article 101(1), and the Commission should therefore reconsider the importance of further clarifying the Guidelines on this point.

SUBSTANTIVE COMMENTS

Chapter 4

12. Whilst it is understood that the proposed amendments to chapter 4 are intended to make it clear that the chapter applies to all sectors, and to joint negotiation as well as to joint purchasing, InterDigital is concerned that the new reference to licensing negotiation groups ("LNGs") for SEP licensing in paragraph 312, implying that they may have the same potential procompetitive benefits as "joint purchasing arrangements" for goods and services, is unwarranted and potentially ill-conceived and requires further consideration. Such groups could also have the effect of collective hold-out behavior, and some market based examples already exist of this as we explain further below.

13. In particular it is not clear whether, or to which extent, the market structure and mechanisms of markets for goods and services would apply in the context of licences for the use of standardised technology subject to patent protection. Unlike the purchase of goods or services, there are, by definition, no substitutes for the SEPs that need to be licensed by the individual members of the LNG, nor are there alternative purchasers that an owner of SEPs can license if it does not like the terms being offered by the LNG. Thus, the normal market dynamics for joint purchasing of goods and services may not be present in this unique market for the licensing of SEPs. As a consequence, LNGs could, in some circumstances, lead to all or nothing bargaining postures that would result in sub-FRAND royalties or a concerted hold-out situation.

14. Moreover, unlike the goods or services that are normally the subject of joint purchasing arrangements, the characteristics of SEP licences are often highly individual. The licence required by any particular licensee will relate to that specific licensee's product mix and average selling prices, as well as its geographic sales profile (all of which may change over time). Licences may also need to take account of the business model and circumstances of each licensee, and the desired structure and payment terms of the licence (e.g. running royalties, fixed fee with upfront payment, etc.). SEP licensing is not simply a matter of setting a price – the full terms and conditions of the licence must be considered as a whole. Thus, a FRAND licence for one licensee will not necessarily contain the same terms and conditions as that for another licensee, even where they are similarly situated.

15. Further, whilst prices (royalties) for such licences are in practice negotiated to some extent, the boundaries of such negotiations are already regulated by the application of the FRAND principle (if necessary, through court proceedings), which is intended to benefit the licensor and licensee alike, but was never intended to allow for the displacement of competition through concerted action.

16. For all these reasons, it is far from clear how the Commission has concluded that joint negotiation of licence terms may be analysed for its effect on competition with reference to the principles set out in chapter 4.

17. Whilst the academic opinion from Professors Whish & Bailey obtained by the Commission advises that an LNG would not be considered a breach by object but would need to be assessed by effect, the authors give no indication of how such an assessment could be made in the unique legal and economic circumstances described above. Licensors and licensees will therefore be unable to make that assessment reliably in respect of any particular agreement for an LNG.

18. In these circumstances as discussed above, InterDigital is concerned that the net effect of any agreement for an LNG may be to enable and implement collective hold out, in order to force compensation for patent infringement on a global scale to sub-FRAND levels.

19. Given these uncertainties and concerns, in the absence of a recognition in the Guidelines of the differences between joint purchasing of goods and services as compared to the joint negotiation for the licensing of SEPs, and an explanation of how these differences may impact on the competitive analysis of LNGs, InterDigital believes that inclusion of the reference to LNGs in paragraph 312 is unwarranted and possibly ill-conceived, and should therefore be deleted.

Chapter 7

Blanket disclosures (Paragraph 483)

20. In the context of the safe harbour provisions at paragraphs 477 to 483, InterDigital notes the requirement for more specific disclosure, whilst accepting blanket disclosure as an exception or less effective way to achieve the two objectives of ensuring (i) an informed choice of the technology to be included in the standard and (ii) an effective access to the result of the standard.

21. We observe that in practice the option of allowing blanket disclosure undoubtedly provides effective and often economically-efficient access to the result of the standardisation process, and is the norm in many SDOs. If these proposed amendments to the Guidelines are formulated largely with reference to circumstances at ETSI, there is a risk that they will be inconsistent with the practices of other SDOs, of which there are many. Whether specific disclosure is necessary or appropriate will depend upon the particular activities of the SDO in question. Moreover, even with reference to ETSI, ETSi's disclosure policy deems as disclosed, and bound by the FRAND declaration, all family members of a patent that has been specifically disclosed.

22. As to informed choice between contributions, the identity of contributors is usually transparent and, since SDOs develop leading-edge technology, it is reasonable to assume that any contribution will be subject to patent rights. However, it has not been InterDigital's experience that SDOs, in selecting technologies to be included in a standard, distinguish between patented technologies based on the royalty rate that may accompany a licence to such technologies, provided that they are covered by a FRAND commitment.

Restricted membership and Special Interest Groups (Paragraphs 496 and 507)

23. InterDigital notes that an objective of the proposed amendments at paragraphs 496 and 507 is to allow more flexibility in the effects analysis by allowing, under certain circumstances, more limited participation in the development of a standard.

24. However, InterDigital's experience has been that the establishment in some SDOs of Special Interest Groups (SIGs) with restricted membership provided little or no transparency for non-participating SDO members that seek to develop and agree on technical proposals for inclusion in a standard. Such SIGs can be used to manipulate and undermine open, consensus-based standards development, thereby harming competition and the quality of the standard. In some circumstances, SIGs representing a large percentage of voting rights (and thus possessing "dominance" over the standards development process) have agreed on a ready-made technical solution that is then presented for adoption by the full technical committee of the SDO as a *fait accompli*, with no effective opportunity for excluded SDO members to influence the outcome or propose alternative technologies. For instance, the U.S. Department of Justice opened an investigation of just this sort of competitive problem with respect to an SIG (DensiFi) established in the course of standards development at IEEE. InterDigital suggests that competitive concerns about such groups be reflected in the Guidelines.

Assessment of FRAND terms (Paragraphs 484, 486, 487 and 491)

25. Although the amendments to paragraphs 486 and 487 remove some of the existing text concerning assessment of whether royalty rates are unfair or unreasonable we do not believe that it is appropriate to further develop these aspects in the Horizontal Guidelines.

26. The Guidelines are concerned with Article 101 TFEU and questions of valuation are therefore not relevant. Paragraph 485 makes it clear that an SDO is not required to make any assessment of FRAND terms; indeed for an SDO to do so could raise competition law concerns. The current Guidelines contain some discussion of FRAND valuation but acknowledge (at paragraph 290) that the discussion is non-exhaustive. It is therefore unclear why further unnecessary material on FRAND valuation has been added to these Horizontal Guidelines. It should be recalled that FRAND valuation remains to a large extent a contractual matter which is dependent on many case-specific factors and facts.

27. Paragraph 491 now states that competition is likely to be restricted where the result of a standard is only available on "discriminatory or excessive" terms. The question of "discriminatory or excessive" terms is not for assessment under Article 101 but would fall under Article 102. Footnote 270 (at paragraph 470) makes clear that high royalties are only “excessive” if the conditions for abuse of dominant position are fulfilled, which should include that the high or discriminatory prices result in a distortion of market competition. However, that clarification is missing from the other references to excessive or discriminatory royalties, such as in paragraphs 484 and 491.The European standardization framework relies on competition law hence regulation seeks to address discrimination and excessive terms – rather than seeking to find a balance and trying to look into whether innovators are fairly compensated. The debate seems to be limited to restricting competition based on antitrust theory while in real life there is no restricting competition by SEP holders; rather we experience widespread hold-out behaviour which the competition regime appears not to be able to address.

Ex ante disclosure of maximum accumulated royalty rate (Paragraph 500)

28. We note the proposed new statement at paragraph 500 that standard development agreements providing for the ex-ante disclosure of a maximum accumulated royalty rate by all IPR holders will not, in principle, restrict competition within the meaning of Article 101(1). It is not clear, however, whether this is referring to ex ante disclosures of such an aggregate royalty rate by individual IPR holders, or whether it contemplates a concerted disclosure of such an aggregate rate by a group of IPR holders or implementers, or by the SDO itself. Proposed footnotes 297 and 298 appear to contemplate that joint disclosures of such an aggregate royalty rate would also be viewed as not, in principle, restricting competition under Article 101(1).

29. Whilst we believe the intention of this addition is unobjectionable if limited to individual, unilateral ex ante disclosures or statements regarding a total maximum royalty stack, InterDigital has concerns that the provision could have very anticompetitive implications and has the risk of supporting the formation of cartels. Such a joint announcement or agreement could constitute an agreement to fix a maximum price that will be paid for a licence to SEPs or a concerted agreement to refuse to take a licence at a rate that exceeds a proportionate share of such a maximum accumulated royalty rate in contravention of Article 101(1).

30. With regard to the concern that an SDO itself might rely on this new language to adopt an IPR policy regarding the total aggregate royalty rate, as appears to be contemplated by new footnote 298, the Commission may have the mistaken impression that such an action spurred by implementer members of the SDO would not be possible in the absence of agreement of SEP holders. While that may be the case in the context of a consensus-based SDO like ETSI, not all SDOs operate as consensus-based organisations, particularly with regard to the adoption of IPR policies. (See, for example, the policy of IEEE in this regard.)

31. Therefore, we suggest that the Guidelines further clarify whether joint disclosures or agreements on the maximum accumulated royalty rate are intended to be covered by paragraph 500. If so, we suggest that that statement that such disclosures will not, in principle, restrict competition within the meaning of Article 101(1) be modified to recognise the potential anticompetitive effects of such joint conduct.

Mandatory royalty free IPR policies at SDOs (Paragraphs 482 and 483)

32. We note that the new last sentence of paragraph 482 as well as paragraph 483 (final sentence) imply that a SDO with a mandatory royalty free IPR policy could fall within the safe harbour provisions of paragraphs 477 to 483 inclusive. Such a broad-brushed exemption from scrutiny under Article 101(1) is unwarranted and potentially problematic. A mandatory royalty free IPR policy by an SDO will likely have the effect of excluding all potential technology contributors to the standard who rely on licensing income to recoup their investments in R&D. This could constitute a denial of effective access to the standards development process for an important category of potential participants, such that the SDO would no longer satisfy the criteria for qualification as an open, transparent and consensus-based SDO, and thus no longer fall into the category of SDOs that are presumed to not restrict competition within the meaning of Article 101(1). In fact, mandating royalty free IPR policies could work to exclude any and all parties of the innovation ecosystem that do not have manufacturing related revenue sources, such as universities and research companies, in particular parties that are funding their research by revenue generated from the intellectual property they create – those parties would be deprived from a fair and reasonable return on their investment.

33. Therefore, we recommend that the Guidelines make clear that IPR polices of SDOs mandating, as opposed to providing an option for voluntary, royalty-free licensing will be subject to careful scrutiny to determine whether such agreed policies may have the effect of excluding competition or distorting market competition.

"License to all" (Paragraph 482)

34. We note that the Commission has not, as of yet, amended paragraph 482, as we advocated in our submission of 5 July 2021. We do not consider that the cases cited at footnote 278 would support an assertion that a SEP owner is obliged to directly license any and every party in the value chain upon request – in part because that would be practicably unworkable and legally impossible. In this regard we note that a recent answer given by the Commission to a parliamentary question[1] appears to indicate that the Commission recognises that automotive manufacturers, for instance, may be required to take a SEP licence. We also note that a US court has recently dismissed a claim under antitrust law seeking to overcome alleged refusals by a licensing platform created by some SEP owners and by some SEP holders

[1] *Answer given by EV-P Dombrovskis dated 4 April 2022 to Parliamentary question ref. E-000559/2022:* *https://www.europarl.europa.eu/doceo/document/E-9-2022-000559-ASW_EN.html*

individually, to license upstream of automotive manufacturers[2]. These developments tend to support the position that an SEP owner is entitled to choose to license at the level in the value chain that is most efficient and consistent with industry practice, which in many cases is the end product level. Nor is there a legal basis or a clear theory of competitive harm that would support a "license to all" requirement for all SDOs. Therefore, we recommend that the Commission reconsider the importance of further clarifying the Guidelines on this point.

We remain at your disposal for further details on any of the above comments.

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[2] *Continental v Avanci et al., US Dictrict Court of Appeals for the Fifth Circuit, Case No. 20-11032 (February 28, 2022).*