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Public consultation on EU competition rules on
horizontal agreements between companies – evaluation

RESPONDENT PROFILE

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I. INTRODUCTION

A. About Ericsson

With more than 95,000 employees, of which over 35,000 are located in Europe, and a presence in more than 180 countries, Ericsson is one of the world's leading providers of information and communication technology. The over 25,000 engineers in our research & development team (of which 14,000 in Europe) form the heart of Ericsson's business, and with more than 49,000 granted patents, we have one of the industry's strongest patent portfolios. Over the last three years, Ericsson has invested approximately 100 billion SEK (around 11 billion EUR) in R&D, approximately 18% of its revenues, and remains a world leader in the rapidly changing environment of communications technology – supplying equipment, software and services to enable transformation through mobility.

B. The consultation

Ericsson thanks the European Commission (the "Commission") for the opportunity to provide input on the evaluation of EU competition rules on horizontal agreements between companies, namely the two relevant Block Exemption Regulations and the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (the "Horizontal Agreements Framework").

This submission focuses on the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (the "Horizontal Guidelines"), more specifically on Section 7 which deals with standardisation agreements.

As one of the leading innovators and technology contributors in mobile telecommunication and related sectors, Ericsson is critically dependent on the ability to disseminate its technology as efficiently and effectively as possible. In particular, Ericsson's intensive R&D investments are directly dependent on the licensing revenues it collects. As a result, any inappropriate - direct or indirect - constraints imposed on the licensing of its technology that is essential to the implementation of 2G, 3G, 4G (LTE) and 5G interoperability standards would not only be detrimental to the digitization of many industries, but also have a direct negative impact on Ericsson and other technology leaders in this respect.

Indeed, as the Commission has observed itself, the digitalization of the economy creates great opportunities for the EU. The estimated economic potential of Internet of Things ("IoT") applications in devices for humans, home, offices, factories, worksites, retail environments, cities, vehicles and the outdoors will be up to EUR 9 trillion per year by 2025 in developed countries. The digitalization of products and services can add more than EUR 110 billion in revenue to the European economy per year over the next five years. Without interoperability, enabled by standards, 40% of the potential benefits of IoT systems would not be reaped.¹

Any guidance provided by Section 7 of the Horizontal Guidelines in relation to the organization of standard development activities, the intellectual property policy of Standard Development Organizations ("SDOs"), and the repercussions thereof for companies' licensing arrangements regarding standard essential patents is therefore of specific importance.

As noted in Ericsson's submission of 2 October 2019 on the evaluation and fitness check roadmap, the Horizontal Agreements Framework is key to ensuring the European participation in the development of 5G and IoT standards. Given the delicate balance that the Horizontal Agreements Framework intends to safeguard, caution and careful reflection are needed to ensure that standardisation work is not negatively impacted. This is particularly true as changes to this framework may negatively affect the ability of European innovators to recoup their significant investments in R&D needed to sustain their involvement in standardisation work, in particular the licensing of patented standardised technology.

II. GENERAL PRINCIPLES THAT SHOULD GUIDE THE COMMISSION IN THE EVALUATION AND REVISION OF THE HORIZONTAL GUIDELINES

Before commenting on specific substantive aspects of the Horizontal Guidelines, Ericsson wishes to emphasise a number of sound competition principles that should in its view guide the Commission in the evaluation and revision of the Horizontal Guidelines.

A. Purpose and scope of the consultation

It is important to recall the scope and objective of the consultation. The scope of the consultation, as announced in the evaluation and fitness check roadmap, covers the two relevant Block Exemption Regulations applying to certain categories of horizontal cooperation agreements (namely those relating to research and development agreements as well as specialization agreements) and the Horizontal Guidelines.² As such, the mandate of the evaluation relates exclusively to horizontal cooperation agreements between undertakings, which are governed by Article 101 TFEU. Accordingly, the evaluation of the Horizontal Guidelines does not, and should not, extend to the evaluation of guidance with

¹ Note 5, *infra*, page 1.

² Evaluation and fitness check roadmap, p. 1, available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-4715393_en.

respect to abuse of dominance, which is governed by Article 102 TFEU, nor should it extend to vertical restraints.

This is particularly relevant as many of the current debates surrounding the licensing of standard essential patents rely first and foremost on the interpretation and application of (i) Article 102 TFEU and (ii) Article 101 TFEU in the context of vertical (licensing) agreements. It would be inappropriate to bring about changes, whether intended or not, to those fields of the law through modifications of the Horizontal Guidelines.

It is also crucial to remember the purpose of the Horizontal Guidelines. That purpose, as described in the Horizontal Guidelines themselves, is to provide a framework, primarily based on legal and economic criteria, which helps analyse horizontal cooperation agreements and the context in which they occur.³ The Horizontal Guidelines are designed, *inter alia*, to contribute to reducing the costs for ensuring compliance with Article 101 TFEU and to ensure a consistent application of that provision by competition authorities and courts of the EU Member States.⁴

The Horizontal Guidelines thus primarily serve to facilitate the self-assessment by undertakings of the compliance of their conduct with Article 101 TFEU, based on well-established principles. The Horizontal Guidelines are not intended to create new law, and certainly not to rewrite existing case-law set out by the EU courts. The evaluation and revision of the Horizontal Guidelines therefore calls for restraint on the part of the Commission so as not to exceed those clear boundaries.

When considering possible amendments to Section 7 of the Horizontal Guidelines, the Commission should be mindful of its own work in the area of standard essential patents. In particular, in 2017, there was much discussion in specialised circles on whether far-reaching and prescriptive norms for the licensing of standard essential patents at fair, reasonable and non-discriminatory (“FRAND”) conditions should be included in the Commission’s Communication “Setting out the EU approach to Standard Essential Patents”.⁵ Those changes would potentially have resulted in major disputes on existing licensing arrangements regarding standard essential patents and very significant changes to economically efficient licensing practices. Eventually, the Commission chose not to include any detailed requirements regarding the licensing modalities of standard essential patents in the communication.⁶ Since then, issues regarding standard essential patents and FRAND are being discussed within a Commission-appointed group of experts on licensing and valuation of standard essential patents, attended by multiple services including DG GROW and DG CNECT.⁷ Ericsson assumes that DG COMP would not want to preempt the work of this Commission inter-services - experts partnership group and respectfully submits that it should not do so in the revised version of the Horizontal Guidelines.

Accordingly, the revision of Section 7 of the Horizontal Guidelines should refrain from prescribing specific licensing models or conditions that are not based on well-established principles and standard industry practices, such as the level in the supply chain at which licensing of standard essential patents should take place. Such a prescriptive approach imposing *quasi* mandatory principles would also be at odds with the Commission’s 2017 communication on standard essential patents, which clearly recognises that, because

³ Horizontal Guidelines, para. 5.

⁴ Evaluation and fitness check roadmap, pp. 1-2.

⁵ Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2017:0712:FIN>.

⁶ See Lugard and Askaryar, The European Commission’s Communication on Standard Essential Patents, Public Domain, Intellectual Property Committee, ABA Section of Antitrust Law, February 2018, p. 1.

⁷ <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupId=3600>.

industries and business models greatly vary, there cannot be a one-size-fits-all solution for matters relating to FRAND and standard essential patents.⁸

B. Neutrality across business models and Member States

Any revisions of the Horizontal Guidelines should be business model neutral. In the area of standardisation and technology licensing, this translates to a legal landscape in which all types of technology contributors are incentivised to take part in standardisation including universities, SMEs, research institutes, large national and multinational companies.⁹ This helps attract the best possible technologies that support the development of the best standards to the benefit of consumers, who benefit from both higher quality products based on the standard, as well as from competition that results from low barriers to entry brought about by robust technical standards. Conversely, competition rules that distort the market-created level playing field or, worse, that are likely to exclude certain market players from the marketplace, are undesirable because they reduce competition rather than enhance it.

Similarly, any revisions of the Horizontal Guidelines should be Member State neutral. Intellectual Property (“IP”) is a form of property that is traded in the marketplace through licensing or through one-off sales. Article 118 of the TFEU, whose normative level is equal to that of Articles 101 and 102, establishes “*measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements*”. In line with this framework, the revision should therefore be mindful not to distort the European IP marketplace in a manner that would distinctly favor the industry interests of one Member State over those of other Member States.

C. Protecting the competitive process, not the interest of specific competitors

Any revisions of the Horizontal Guidelines should be considered only where harm can be observed to the competitive process itself. This principle implies that there must be a high degree of certainty that a particular business practice produces competitive harm and that, in turn, competition authorities would be ill-advised to mandate specific (IP-related) conduct if no consensus exists with respect to it. The lack of consensus may be apparent, e.g., from continued litigation or diverging assessments by competition authorities in a number of jurisdictions. Such approach ensures that EU competition law is applied to the benefit of consumers rather than to the benefit of specific market players.

As discussed in more detail in this submission, there is no reason to believe that the competitive process in mobile telecommunication technologies markets is not functioning well, or that the standardisation process in these markets is fundamentally flawed. In fact, all key indicators point in the opposite direction: many new technology owners enter these markets on a continuous basis and successive generations of technology have become widely available for implementation in numerous end-products and networks, while overall consumer prices have decreased.¹⁰

⁸ Commission's Communication “Setting out the EU approach to Standard Essential Patents”, in particular pp. 6-8.

⁹ As further discussed below, the current Horizontal Guidelines already acknowledge that groups of companies with different interests in standardisation can be distinguished and that all competitors in the markets affected by the standard can participate in the process. See, respectively, paragraphs 267 and 281.

¹⁰ See for instance Galetovic, Haber and Zaretski, Is There an Anti-Competitive Tragedy in the Smartphone Industry?, 32 Berkeley Technology Law Journal (2018); The Boston Consulting Group, The Mobile Revolution, How Mobile Technologies Drive a Trillion-Dollar Impact, January 2015, available at http://image-src.bcg.com/Images/The_Mobile_Revolution_Jan_2015_tcm9-80158.pdf.

D. Caution not to cause market failures in the already-fragile intellectual property and standardisation markets

Unlike markets based on tangible property, markets based on intellectual property rights (“IPRs”) are especially susceptible to market failure. This is because their non-rivalrous nature renders their infringement easy, and property holders’ only recourse against strategic infringers is a long and costly legal battle in courts. In the (cellular) standardisation context, this is further impacted by the additional threshold created by the ruling of the Court of Justice of the European Union (“CJEU”) in *Huawei v ZTE*¹¹ that has put in place a framework for the enforcement of standard essential patents owned by those who contribute their technology to the creation of standards. In essence, the *Huawei v ZTE* judgment limits the ability of IP owners to halt the infringement of their intellectual property rights through injunctive relief, especially if the infringer is considered a willing licensee. As a result, holders of standard essential patents need to comply with specific obligations of conduct before they can request injunctive relief. Against this backdrop of an already fragile ecosystem, any revisions of the Horizontal Guidelines that would put competition enforcers’ thumb on the scale against technology contributors and owners of standard essential patents and in favor of technology-users threaten to break that eco-system altogether.

E. Taking into consideration other EU bodies of law

Competition rules do not operate in a legal vacuum. Rather, they operate together with other legal principles, most notably with property laws, without which markets cannot operate in the first place.

In relation to IP, the non-competition legal framework includes, in particular, (i) Article 17(2) of the Charter of Fundamental Rights of the European Union, which provides that “[i]ntellectual [p]roperty shall be protected”; (ii) the intellectual property enforcement directive;¹² and (iii) WTO TRIPS, which requires that “*procedures concerning the enforcement of intellectual property [...] shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays*”.¹³ Any revisions resulting from the consultation must therefore comply with these obligations.

III. GENERAL PRINCIPLES REGARDING STANDARDISATION AGREEMENTS

Section 7 of the Horizontal Guidelines sets out guidance regarding standardisation agreements. As part of this guidance, a number of general principles are set out which emphasise the generally pro-competitive nature of standardisation agreements. In particular:

- It is acknowledged that standardisation agreements usually produce significant positive economic effects, for example because they enhance quality, provide information and ensure technical interoperability and compatibility, thus increasing value for consumers.¹⁴

¹¹ CJEU, judgment of 16 July 2015, Case C-170/13, *Huawei v ZTE*, ECLI:EU:C:2015:477.

¹² Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16).

¹³ WTO, TRIPS, Part III, Enforcement of intellectual property rights, Article 41(2), available at https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm. It also follows from Article 30 that any exceptions to the exclusive rights conferred by a patent should not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

¹⁴ Horizontal Guidelines, para. 263. See also paras. 308 and 321.



- It is made clear that there is no presumption that holding or exercising standard essential patents equates to the possession or exercise of market power.¹⁵
- It is explicitly recognised that there exist different models of SDOs. The Horizontal Guidelines do not seek to prescribe specific rules and procedures for SDOs.¹⁶
- It is stated that high royalty rates charged for the use of standard essential patents do not in themselves give rise to EU competition concerns. Such concerns only arise where they bear no reasonable relationship to the economic value of the IPR and where the conditions for an abuse of a dominant position as set out in Article 102 TFEU and the case-law are met.¹⁷
- It is presumed that where participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements that contain no obligation to comply with the standard and provide access to the standard on FRAND terms, will normally not restrict competition.¹⁸

Ericsson is of the view that these general principles remain valid and should be maintained in the revised Horizontal Guidelines.

In addition, Ericsson is of the view that the following points would deserve clarification in the revised Horizontal Guidelines:

- Ericsson understands that Section 7 of the Horizontal Guidelines is intended to cover both (i) standard setting agreements, i.e. agreements setting out standards, for example, on the environmental performance of products¹⁹ and (ii) standard development agreements, e.g. agreements relating to SDOs such as the 3rd Generation Partnership Project ("3GPP") and related organizations that provide for technology development. Ericsson believes that it would be helpful to clarify the distinction between the two types of standardisation in the introduction of Section 7 of the Horizontal Guidelines.
- Ericsson would like to point out that, in the context of 3GPP, holders of standard essential patents do not only collaborate with each other, but also with all other stakeholders, and decisions need consensus support to be adopted. Therefore, it is not conceivable that certain holders of standard essential patents, or indeed any other sub-group, could impose their decisions in terms of standard development on the broader group of stakeholders involved in 3GPP. In light of this dynamic, it appears very unlikely that competition concerns, such as those related to a limitation of technical development and innovation, arise.

IV. ABSENCE OF A COMPULSORY "LICENSE TO ALL"

In recent years, it has increasingly been debated whether holders of standard essential patents are subject, in particular based on EU competition law, to a duty to offer a direct license on FRAND terms to all interested parties, irrespective of their level in the supply chain ("license to all requirement"). The Horizontal Guidelines have sometimes been relied upon to support such a proposition. Such an obligation to respond positively to licensing

¹⁵ Horizontal Guidelines, para. 269.

¹⁶ Horizontal Guidelines, para. 279.

¹⁷ Horizontal Guidelines, paras. 269 and 289.

¹⁸ Horizontal Guidelines, para. 280.

¹⁹ Horizontal Guidelines, para. 257.

demands from implementers regardless of their level in the production chain, including from component manufacturers, would contrast sharply with the discretion of holders of standard essential patents to decide at which level of the production chain to license their IP and, more generally, with overwhelming pro-competitive industry practice.

Ericsson submits that neither Articles 101 or 102 TFEU, nor the Horizontal Guidelines mandate a license to all. Moreover, in light of the severe inefficiencies and impracticalities that such a licensing system would bring with it, it is vital that the revised Horizontal Guidelines refrain from suggesting that holders of standard essential patents are subject to a license to all requirement and make clear that such a general obligation does not exist.

A. There is no legal basis in EU competition law for a license to all requirement

There is no provision of EU competition law, nor any precedent which would support the existence of a license to all requirement. No plausible theory of harm supports claims that licensing of standard essential patents at one particular level of the supply chain (e.g. the end-product level) would infringe Articles 101 or 102 TFEU. In particular:

- Licensing of standard essential patents confined to one particular industry level does not qualify as anticompetitive refusal to license. This is because it is not indispensable for all players in the supply chain to enter into a direct license with the holder of standard essential patents to successfully and lawfully manufacture and market their products which implement the standard. Industry practice evidences that parties to which holders of standard essential patents do not offer a direct license, including component manufacturers, nevertheless have effective access to the standard, because they benefit from end-product manufacturers' licenses which they supply, through a variety of mechanisms, such as have made rights and non-assert covenants. This is a long-standing practice in the industry that benefits holders of standard essential patents, manufacturers of final products and component makers alike.

Moreover, patent exhaustion prevents holders of standard essential patents from licensing the same standard essential patents at multiple levels of the supply chain. Therefore, because all relevant patents are typically licensed to end-product manufacturers, holders of standard essential patents cannot, in principle, lawfully require a license from implementers that operate further up the supply chain for the same patents. If, despite the principle of patent exhaustion, a holder of standard essential patents were nevertheless to require a license from, e.g., component manufacturers (as opposed to manufacturers of final products), the CJEU's *Huawei v ZTE* case-law would require it to first extend a FRAND offer to the components manufacturers at issue before it could request any injunctive relief. Accordingly, for all practical purposes, irrespective of their level in the supply chain, implementers of standard essential patents are able to freely market their products without facing undue restrictions. For the same reason, licensing manufacturers at the end-product level only cannot be said to give rise to any competitive harm, such as restriction of innovation or R&D at the component maker level, as has been alleged by certain players in the automotive industry.²⁰

- Licensing at the end-product level does not amount to anticompetitive discrimination. In particular, implementers which operate at different levels of the supply chain are not in a competitive relationship. Component manufacturers can therefore not be placed at a competitive disadvantage compared to end-product manufacturers as a

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Mlex, Nokia's connected-cars SEP licensing prompts EU queries on R&D to parts makers, 21 May 2019.

result of the decision of the owner of the standard essential patents to only license manufacturers of the end device.

- Licensing at the end-product level does not constitute excessive pricing. The licensing level of standard essential patents and the royalty rate (and the assessment of whether it is excessive) are entirely separate questions. No inference can be made from the former to the latter.
- Huawei v ZTE does not prescribe a license to all requirement. While the ruling mentions that a FRAND undertaking gives rise to legitimate expectations on the part of third parties that holders of standard essential patents will in fact grant licenses on FRAND terms, it does not contain any indication about a potential duty to license standard essential patents at a specific level, or at all levels of the supply chain. This is confirmed by the fact that the ruling relates to a very specific factual scenario involving actions for an injunction and the recall of infringing products involving the two parties of the dispute; the notion of legitimate expectations relates to the relationship between the two parties that have agreed to negotiate the terms of a license. In any event, any legitimate expectations would necessarily also depend on the specific terms of the FRAND undertaking given at issue and thus on the IPR policy of the relevant SDO. In turn, ascertaining the IPR policy of specific SDOs may involve questions of contract law, for example of French contract law in relation to ETSI's IPR policy. Ericsson notes in this regard that the precise meaning of the ETSI FRAND undertaking is disputed even among French civil law experts and does not provide a basis for the assumption that ETSI's IPR policy, in particular, contains any requirement as to the level at which licenses are offered.²¹ Finally, the *Huawei v ZTE* ruling does not suggest that any breach of a contractual FRAND commitment would automatically constitute an infringement of EU competition law. FRAND and EU competition law are separate legal concepts.
- A number of important national court decisions confirm, explicitly or implicitly, the freedom of holders of standard essential patents to choose at which level they wish to license within a complex multi-level production chain.²² If the Commission were to

²¹ See, for example, Huber, Bertram, Why the ETSI IPR Policy Does Not and Has Never Required Compulsory 'License to All': A Rebuttal to Karl Heinz Rosenbrock (September 15, 2017), available at SSRN: <https://ssrn.com/abstract=3038447>. This is also supported by the fact that FRAND licenses may be based on the end-user device (rather than the smallest salable patent-practicing unit ("SSPPU")), which is in fact the prevailing industry standard: U.S. District Court for the Eastern District of Texas, *HTC Corporation et al vs Ericsson*, 7 January 2019: "the parties to the ETSI IPR policy did not intend to impose a requirement that every FRAND license must be based on the SSPPU. [...] Several independent sources confirm that the prevailing industry standard or approach has been to base FRAND licenses on the end-user device and not on the SSPPU. See Kjelland, Kurt, Brooks, Roger G., & Zhang, Xiaolin, *FRAND Licensing of Standard Essential Patents*, in *PATENTS AND STANDARDS PRACTICE, POLICY, AND ENFORCEMENT* 11–8 (Michael L. Drapkin et al. eds., Bloomberg Law Book Division 2018) ("Three authors with long and wide experience in licensing in the cellular industry have written that 'In our experience, all significant patent holders in the cellular communications industry use the device price as the royalty base.'"); Siebrasse, Norman V. & Cotter, Thomas F., *Judicially Determined FRAND Royalties*, in *THE CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW* 374–75, 377–86 (Jorge L. Contreras ed., Cambridge University Press 2018)."

²² In particular, there are a number of European judgments which confirm that it is best industry practice for holders of standard essential patents to enter into worldwide licenses with implementers at the end-product level. Judgments which confirm this, in that they granted injunctions against end-device manufacturers, include, in particular, UK High Court, judgment of 5 April 2017, *Unwired Planet v Huawei* [2017] EWHC 711 (Pat); German Regional Court of Mannheim, judgment of 29 January 2016, *NTT DoCoMo v HTC*, Case No. 7 O 66/15; German Regional Court of Düsseldorf, judgment of 9 November 2018, *MPEG-LA v Huawei*, Case No. 4a O 17/17. In the U.S., see also U.S. District Court for the Eastern District of Texas Tyler Division, Memorandum Opinion and Order, *Ericsson v. D-Link*, No. 6:10-00473, 2013 WL 2242444 (Aug. 6, 2013) available at <https://www.essentialpatentblog.com/wp-content/uploads/sites/64/2013/08/13.08.06-Dkt-615-Ericsson-v.-D-Link-Order-on-Post-Trial-Motions.pdf>

set out a compulsory license to all principle in the revised Horizontal Guidelines, such an alteration of Section 7 would disregard those national decisions.

B. The Horizontal Guidelines do not provide for a compulsory license to all

In the absence of any legal basis in EU competition law, it is clear that the Horizontal Guidelines could not mandate a license to all either. Nevertheless, the Horizontal Guidelines have been relied upon to support the claim that holders of standard essential patents are subject to such a requirement. Ericsson will demonstrate below that such claims are based on a misreading of the Horizontal Guidelines. This question concerns, in particular, the following two paragraphs, both of which relate to the notion of providing (effective) access to the standard:

- Paragraph 285 provides that, in order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on FRAND terms.
- Paragraph 294 provides that if the essential IPR for implementing the standard(s) is not at all accessible, or only accessible on discriminatory terms for members or third parties (that is to say, non-members of the relevant standard development organization), this may discriminate or foreclose or segment markets.

None of these two paragraphs, nor any other paragraphs in the Horizontal Guidelines, mandate a license to all:

- Section 7 of the Horizontal Guidelines does not seek to set out prescriptive rules which all standardisation agreements would have to follow, failing which they would fall afoul of Article 101 TFEU. Sub-section 7.3.3. “Restrictive effects on competition” and, in particular, paragraphs 280 to 286, merely set out optional principles designed to create a safe harbour. Paragraph 279 unambiguously states that “[t]he non-fulfilment of any or all of the principles set out in this section will not lead to any presumption of a restriction of competition within Article 101 TFEU.”
- Most importantly, the claims that paragraphs 285 and/or 294 support the existence of a license to all requirement are based on an erroneous and out-of-context interpretation. While it is true that paragraph 285 refers to “all third parties”, this term is not defined. This paragraph does not specify at which level in the supply chain licensing of standard essential patents should take place. Such a general prescription would also be at odds with paragraph 284, which emphasises the importance of IPR policies being adapted to the particular industry and the needs of the SDO in question. Likewise, when paragraph 294 refers to the scenario where essential IPR is made accessible on discriminatory terms to third parties, there is no indication whatsoever that such discrimination would encompass a situation where a holder of statement essential patents decides to license at only one level of the supply chain. In fact, paragraph 294 presumably only refers to discriminatory licensing terms (royalty rates, etc.).
- Paragraphs 285 and 294 refer to the principle of effective access to the standard, which is a key objective pursued by Section 7 of the Horizontal Guidelines. However, effective access to the standard should not be conflated with a direct license to

(appealed on different grounds), in which the argument that Ericsson may have breached its RAND obligation to offer licenses to an unrestricted number of licensees “by not suing Intel, then not seeking damages against Intel after it intervened in the case” was rejected.



standard essential patents. As noted above, third parties that do not have a direct license can nevertheless have effective access to the standard through other means.

C. A license to all would be highly inefficient and impractical

A license to all requirement would effectively dictate holders of standard essential patents the adoption of a particular licensing model which, for numerous reasons, would be highly inefficient and impracticable and would result in significant welfare losses:

- The principle of patent exhaustion prevents holders of standard essential patents from licensing the same patents multiple times in the supply chain.²³ To avoid infringing this principle, it would be necessary for holders of standard essential patents to ascertain, at each level of the supply chain and for each implementer, which specific standard essential patents are being implemented, and enter on that basis into tailor-made licensing agreements.²⁴ This is likely to lead to fragmentation and increased hold-out behavior, as multiple parties will point to their suppliers or customers as the party that is required to take a license under the patents that it is alleged to infringe.²⁵ These concerns are not theoretical, as hold-out behaviour can already be observed in the market today. Thus, a compulsory license to all regime will certainly give rise to even more opportunistic behavior and hold-out.
- The need to enter into a great number of such tailor-made licensing agreements would necessarily result in the demise of patent pools, whose creation and operation has been widely acknowledged as pro-competitive and explicitly encouraged by the Commission.²⁶ Indeed, the efficiencies associated with technology pools critically depend on the aggregation of standard essential patents of different IP owners and providing standard licenses under FRAND terms to manufacturers. An obligation to specifically tailor pool licenses to the (perceived) needs of individual manufacturers or manufacturers active at another level of the production chain at which the pool is set out to license, will eliminate the savings on transaction costs and other efficiencies that are central to the pool.
- Implementing such a system would be extremely burdensome and complex, if not impossible, and would entail excessively high transactions costs, for example in terms of higher costs of negotiations, enforcement, monitoring, and litigation. For example, which players would need a license for which standard essential patents, how is compliance measured where (the number of) licensed components are not readily

²³ The principle of patent rights exhaustion provides that a license exhausts patent rights. That is, once a licensor licences patent rights to a device or any particular component or combination of components, those patent rights are exhausted. In practice, this means that, in a specific value chain, a license may only be granted once. Note that standard essential patent claims in the mobile telecommunications sector may read on various components, various components in combination, handsets and handsets in networks. Standard essential patents that only claim the baseband chip are rare, if not entirely absent.

²⁴ This will certainly give rise to very significant practical problems, which will be compounded by the fact that patent law in different jurisdictions treat scope of claims and exhaustion differently.

²⁵ In addition, in the absence of an obligation for implementers to take a license to the patents exhausted at "their level", a compulsory license to all model could result in a situation whereby the execution of the FRAND commitment is entrusted to the implementer.

²⁶ See in particular Section 4 of the EU Guidelines on Technology Transfer Agreements (Commission, Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C 89, 28.3.2014, p. 3–50, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_2014.089.01.0003.01.ENG) and Regibeau and Rockett, Assessment of potential anticompetitive conduct in the field of intellectual property rights and assessment of the interplay between competition policy and IPR protection, available at <https://op.europa.eu/en/publication-detail/-/publication/21c2bdb4-e366-48a3-b0eb-a26e83024d10/language-en>.

identifiable in the final product? How to prevent concerns about discrimination or multiple dipping?

- A mandatory tailor-made, license to all regime would greatly reduce IP owners' ability to enter into cross-licenses with other IP owners, a practice that stimulates R&D, and innovation and a right that has been explicitly recognised by ETSI.²⁷ This is because other owners of standard essential patents would claim to no longer need or be willing to receive a license if the standard essential patents owner would be under a general compulsory obligation to grant licenses under a "license to all" regime.

All of these factors would put the proper functioning of standardisation work at risk and ultimately impair innovation in Europe, at a crucial time in the development of 5G and IoT standards.

In contrast, end-product licensing of standard essential patents is a proven standard industry practice in a number of sectors, including telecommunications and electronics equipment.²⁸ It has now also been widely adopted in the automotive sector, as demonstrated by the license agreed in 2019 by major car manufacturers (in particular BMW and VW)²⁹ with Avanci. End-product licensing of standard essential patents is efficient and pro-competitive. It avoids negotiations at multiple levels of the value chain and thereby minimises costs. It is also appropriate from a technical and commercial standpoint since it is typically at the level of the end-product that the relevant components are put on the market and the relevant standard essential patents are fully implemented and add most of their value. Moreover, the parties best placed to determine the value of the patent are (i) the undertakings creating the technology, i.e. the standard contributors and (ii) the undertakings using the technology in the products they commercialise, i.e. the end-product manufacturers.³⁰

D. The revised Horizontal Guidelines should not provide for a compulsory license to all

It follows from the above that a compulsory license to all (i) has no legal basis in EU competition law, (ii) is neither prescribed nor recommended by the current Horizontal Guidelines and (iii) would give rise to numerous inefficiencies and impracticalities that would endanger the dissemination of technology innovation in Europe.

For those reasons, Ericsson respectfully submits that it would be wholly inappropriate for the Commission to suggest in the future Horizontal Guidelines that holders of standard essential patents are subject to a license to all requirement and, more generally, to mandate particular FRAND licensing models. Ericsson therefore suggests that the future Horizontal Guidelines include an explicit statement making clear that EU competition law does not mandate a license to all.

Alternatively, and at the very least, the Commission should amend the somewhat ambiguous wording of paragraphs 285 and 294 to make sure that these paragraphs, as well as any other paragraphs, cannot serve to support claims that end-product licensing of standard essential patents infringes EU competition law.

²⁷ Article 6.1 ETSI IPR Policy.

²⁸ See, for example, United States International Trade Commission, Inv. 337-TA-794 In *re Certain Electronic Devices, including Wireless Communication Devices, Portable Music and Data Processing Devices and Tablet Computers* (public version issued July 5, 2013), p.60: "The record supports a conclusion that a common industry practice is to use the end-user device as the royalty base", available at <https://essentialpatentblog.lexblogplatform.com/wp-content/uploads/sites/64/2013/07/337-TA-794-Commission-Opinion-Public-Version.pdf>.

²⁹ <http://avanci.com/avanci-signs-new-patent-license-agreements-volkswagen-group-companies/>.

³⁰ For example, the car manufacturer is best placed to understand the value the consumer is willing to pay for connecting the car.

In relation to paragraph 285, this could be achieved by deleting the words “**to all third parties**”.

V. OPEN SOURCE SOFTWARE

Ericsson wishes to direct the Commission’s attention to what it perceives as a significant gap in the Horizontal Guidelines, in that they do not cover the development of open source software (“OSS”).

OSS development is a collaborative effort similar to collaborative standard development in SDOs. Examples of specific OSS licenses include Apache 2.0, GPL (General Public License) and BSD License.

However, OSS development lacks the typical safeguards associated with standardisation that takes place within SDOs. For example:

- The OSS development process is not necessarily open to all. OSS projects are typically governed by a private, closed foundation, whose members may decide whether or not to allow other participants to participate in the project.
- The OSS development process frequently lacks transparency. There is no secretariat of the type collaborative SDOs use, nor are there competitive peer review type voting selections on what code will be adopted. Instead, there is a code “maintainer” which decides what contributions will be accepted. This may lead to less vigorous competition on the technology/innovation level. Competition agencies have already started looking into these practices.³¹
- Often, as for example with the Apache 2.0 license, the group developing the code collectively imposes a “non-assert” rule whereby anyone attempting to legitimately assert its patent rights on the code (be it a contributor or a non-contributor) loses any patent license rights to use that code. This is especially a problem where the founders developing the open source code enjoy market power, because it would effectively amount to a de-facto group boycott on other companies’ proprietary technology.

Without necessary and appropriate safeguards, OSS development is prone to potential infringements of Article 101 TFEU, probably even more so than “traditional” collaborative standards development because there are often only one or two “maintainers”. Nevertheless, the Horizontal Guidelines currently offer no guidance that mitigate these potential competition concerns. Ericsson is of the view that this situation amounts to a significant gap, which the revised version of the Horizontal Guidelines should address. Ericsson would be pleased to provide additional information in relation to these practices, as well as suggestions how to regulate OSS development.

Ericsson submits that this issue could best be addressed by extending the scope of Section 7 of the Horizontal Guidelines to OSS development. Such an approach would also be in line with a recommendation included in a recent Science for Policy report by the Commission’s Joint Research Centre. This report explicitly recommended developing specific requirements for horizontal cooperation that apply to both SDOs and OSS.³²

³¹ See for instance MLex press clipping of 17 January 2020 (“IBM, Red urge CADE to close probe into Red Hat’s refusal to certify competing solutions.”)

³² Joint Research Centre, Science for Policy report, The Relationship Between Open Source Software and Standard Setting, 2019, p. 81: “Policy makers have provided substantive guidance on the legal

VI. FRAND NATURE OF LICENSING TERMS AND ROYALTY RATES

The Horizontal Guidelines seek to provide guidance on how to assess whether licensing terms and royalty rates offered by holders of standard essential patents to prospective licensees are FRAND.³³ This is somewhat remarkable because the question of whether a license is offered at FRAND terms does not typically arise in the context of horizontal cooperation, but rather is in most cases a “vertical” topic. In fact, SDOs’ IP policies typically do not mandate specific licensing modalities or rates; they generally merely provide that licenses for standard essential patents should be granted on FRAND terms and specifically provide that licensing terms of standard essential patents are to be negotiated on an individual basis between the IP owner and the prospective licensee.³⁴ From that perspective, it would be more logical to address the notion of FRAND in the Commission’s Technology Transfer Guidelines.³⁵ The relevant question to address in the Horizontal Guidelines is merely whether the IP policies of SDOs should provide for FRAND licensing. Ericsson supports the approach of SDOs utilising FRAND commitments to ensure effective access to standards.

In Ericsson’s view, as regards royalties, it would be sufficient that the Horizontal Guidelines refer to the general principle according to which royalties do not give rise to EU competition concerns simply because they may be high, but only where they bear no reasonable relationship to the economic value of the IPR and where the conditions for an abuse of a dominant position as set out in Article 102 TFEU and the case-law are met. The Horizontal Guidelines should not go beyond this general statement.

Despite of the observations made above, the current Horizontal Guidelines refer to a number of methodologies that could be used to determine whether royalty rates charged by IPR holders are unfair or unreasonable within the meaning of FRAND: these methodologies include, in particular, an independent expert assessment of the objective centrality and essentiality to the standard of the relevant IPR portfolio, a comparison with rates charged for IPR in other comparable standards, as well as comparisons with *ex ante* disclosures of licensing terms.³⁶

Ericsson acknowledges that the assessment of the FRAND nature of royalty rates may be complex. Nevertheless, Ericsson submits that it would not be appropriate for the Commission to lay down, in the Horizontal Guidelines, rules on the specific methodologies that should be relied upon to conduct this assessment. Accordingly, this task should in principle be left to the competent courts and tribunals.³⁷ This would also be in line with the Commission’s own observations that “*there is not one-size-fit-all solutions to what FRAND is: what can be considered fair and reasonable differs from sector to sector and over time*” and that “*the*

boundaries and requirements applicable to the substance of IPR policy choices of SDOs with the safe harbour approach defined in the guidelines to horizontal co-operation agreements. No such guidance exists with regard to OSS communities. We recommend developing specific requirements for horizontal co-operation that apply to both SDOs and OSS communities and their collaboration.”

³³ Horizontal Guidelines, paras. 287-291.

³⁴ This is illustrated, for example, by the public statement on IPR policy issued on 3 December 2018 by ETSI’s Director General: “*ETSI wishes to reiterate that specific licensing terms and negotiations are commercial matters between the companies and shall not be addressed within ETSI. The basic principle of the ETSI IPR regime remains [FRAND] with no specific preference for any licensing model*” (available at <https://www.etsi.org/newsroom/news/1458-etsi-s-director-general-issues-public-statement-on-ipr-policy>). Ericsson notes that some SDOs’ IP policies provide that licenses under standard essential patents are made available at zero rates, or, in the case of IEEE, that the royalty base for standard essential patents shall be the component.

³⁵ Commission, Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, OJ C 89, 28.3.2014, p. 3–50.

³⁶ Horizontal Guidelines, paras. 289-290.

³⁷ See, for example, UK High Court, judgment of 5 April 2017, *Unwired Planet v Huawei* [2017] EWHC 711 (Pat), paras. 170-176 and 197-523.



*parties are best placed to arrive at a common understanding of what are fair licensing conditions and fair rates” and that they are “in the best position to determine the FRAND terms most appropriate to their specific situation.”*³⁸ Moreover, as holders of standard essential patents are separate undertakings, it is logical from an EU competition perspective that they should each negotiate licensing terms individually and independently with prospective licensees. Disproportionately detailed guidance on the FRAND nature of royalty rates provided by the Commission in the Horizontal Guidelines could go against this core principle of Article 101 TFEU by artificially increasing transparency in the market and leading to uniform licensing practices.

³⁸ See above, note 5, page 6.