

## Annex – IP Europe’s responses to relevant questions in the Public Questionnaire

### IP EUROPE’s COMMENTS ON THE EU COMPETITION RULES ON HORIZONTAL COOPERATION AGREEMENTS

IP Europe is pleased to submit these comments as part of the review process of the Horizontal Co-operation Agreements Framework. The comments refer to the Horizontal Cooperation Guidelines, in particular Chapter 7 on Standardisation Agreements.

IP Europe’s comments below are mainly focused on aspects of the Guidelines for which it has not responded to directly in its responses to the Public Questionnaire.

#### About IP Europe

IP Europe is a coalition of research and development-intensive organisations headquartered in Europe, whose inventions are protected by intellectual property rights. From global technology leaders and research institutes creating the technologies that underpin the 5G cellular standard, to innovative SMEs which rely on their patent portfolios to grow, IP Europe gives a voice to organisations that recognise the value of IP in fostering innovation, growth and jobs.

Our goal is to promote the vital importance of IPR to the European digital and knowledge-based economy and to ensure that EU policies support a world-leading innovation ecosystem. Today in the EU, 40% of economic activity and 35% of employment – spanning 77 million jobs – are generated by IPR-intensive companies.

#### Clarification on an IPR holder’s FRAND commitment

A principal concern for IP Europe with the Guidelines is in the first sentence of paragraph 285. IP Europe requests that the following words are removed: “to all third parties”. Deleting these words would remove an anomaly, since this expression is erroneously interpreted by some in relation to bilateral licensing negotiations over essential IPR to standards, contrary to both decades of industry licensing practices and most standard development organisations’ (“SDOs”) IPR policies and licensing commitment requests. IP Europe’s reasons are more fully explained in its response to the Public Questionnaire.

The Guidelines are concerned with how SDOs develop standards and ensure effective access to those standards on a fair, reasonable and non-discriminatory (FRAND) basis. They are intended to provide safe harbour guidance to SDOs under Article 101. The Guidelines are not, nor should they be, directed to bilateral licensing negotiations. Only Article 102 has any direct applicability to such negotiations. Accordingly, the Guidelines should not ascribe whether or how an IPR holder is to license its IPR - subject to the licensing commitment it has voluntarily chosen to make to enable consideration of its technology for an SDO’s standard. Provided that the commitment ensures effective access to a standard on a FRAND basis, that is the end of the matter as far as the applicability of Article 101 is concerned.

Neither current industry practices nor existing SDO IPR policies have shown any evidence of market failure (with the possible exception of IEEE, as described further below).

Any changes to the Guidelines should be made only based on either the evolution of the law or policy, or clear economic evidence of market harm. The previous version of the Guidelines did not include

“all”. It is not clear how or why this change was affected in the current version, but it was clearly not based on evidence of market failure or a change of law or policy.

Any potential for confusion in the Guidelines, especially where it might be a cause of future market failure or harm the development of best technology standards if followed, should be removed.

For the reader’s convenience, IP Europe’s responses to the Public Questionnaire on this issue are repeated in the attached Annex to these comments.

### **Defining the scope of due process requirements in standardisation activities**

Chapter 7, titled Standardisation Agreements, fails to encompass standardisation activities in a comprehensive manner.

Since the Guidelines were issued in 2011, and contrary to the open consensus process undertaken at standard development organisations (“SDOs”) such as the European Telecommunications Standards Institute (ETSI), a U.S. standards development body called IEEE took the unprecedented position that the development of policies in SDOs need not be open to all participants in standard development. A closed process there has led to an ongoing market failure in the availability of FRAND assurances for IEEE standards, so that access to many IEEE standards is no longer assured. This has also led to degradation in the quality of IEEE standards,<sup>1</sup> “chaos and delay” in standard development at IEEE<sup>2</sup> and a host of other anti-competitive effects.<sup>3</sup>

To prevent the potential for such market distortion, it is imperative that Chapter 7 of the Guidelines better encompass “standardisation activities” at the beginning of the Chapter. Such definition would clarify the scope of the due process safeguards that are repeatedly referenced throughout the Chapter (openness to all, balance, etc.). For example, it should be clear to readers that the Guidelines also cover the applicable governance rules and policies of an SDO’s standard development process.

There are a few sources of guidance for this, as follows:

- (1) Under EC Regulation 1025/2012, “European standardisation ... is founded on the principles recognised by the World Trade Organisation (WTO) in the field of standardisation, namely coherence, transparency, openness, consensus, voluntary application, independence from special interests and efficiency (‘the founding principles’). In accordance with the founding principles, it

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<sup>1</sup> See ANSI Standards Action (Volume 50, #9), March 1, 2019 at 15, <https://share.ansi.org/Shared%20Documents/Standards%20Action/2019-PDFs/SAV5009.pdf> (“Notice of Disapproval, IEEE (Institute of Electrical and Electronics Engineers. The requested standards actions listed below have not been approved by the ANSI Board of Standards Review (BSR)...BSR/IEEE 802.11ah...IEEE 802.11ai”); Leah Nylan, Electrical engineer institute’s new WiFi measures won’t get American national standard designation (MLex, Mar. 11, 2019) <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/cross-jurisdiction/electrical-engineer-institutes-new-wifi-measures-wont-get-american-national-standard-designation>

<sup>2</sup> In February 2016, IEEE-SA held a session on “discussion of the impact of updated patent policy on IEEE 802”. See Minutes (Unconfirmed) - IEEE 802 LMSC EXECUTIVE COMMITTEE MEETING, Revision 0, pages 42-43. The original version of the discussion is available at [http://ieee802.org/minutes/2016\\_01/2016-01-22-minutes-v0.pdf](http://ieee802.org/minutes/2016_01/2016-01-22-minutes-v0.pdf). Some have later demanded that the text be revised, see later version available at [http://ieee802.org/minutes/2016\\_01/2016-01-22-minutes-v1.pdf](http://ieee802.org/minutes/2016_01/2016-01-22-minutes-v1.pdf).

<sup>3</sup> See David Cohen, The IEEE 2015 Patent Policy – A Natural Experiment in Devaluing Technology (12 August, 2019) <https://www.kidonip.com/news/the-ieee-2015-patent-policy-a-natural-experiment-in-devaluing-technology/>.

is important that all relevant interested parties..., are appropriately involved in the national and European standardisation process.”<sup>4</sup>

The relevant principle interpreting the ‘Founding Principles’ is found in Item E of the Code of Good Practice in Annex 3 to the WTO Technical Barriers to Trade Agreement, titled “Code of Good Practice for the Preparation, Adoption and **Application** of Standards”<sup>5</sup> (emphasis added). As its name suggests, that section also applies to the way in which standards are applied, which would include the policies surrounding it.

Another useful datapoint can be found in definitions employed in other jurisdictions, especially in competition law contexts. For example, the United States Congress has defined the term “standards development activity” in the U.S. Standards Development Organization Advancement Act (SDOAA) of 2004 as follows:

“The term ‘standards development activity’ means any action taken by a standards development organization for the purpose of developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment activities, including actions relating to the intellectual property policies of the standards development organization”<sup>6</sup>

The SDOAA delineates the requirements for obtaining partial immunity from competition law liability in the U.S.

In light of the above guidance, we propose the following revisions to paragraph 295 (only red font text is new):

“295. If **participation in the standard-setting process** is open in the sense that it allows all competitors (and/or stakeholders) in the market affected by the standard to take part in choosing and elaborating the standard **and applicable governance rules and policies of the standard-setting process**, this will lower the risks of a likely restrictive effect on competition by not excluding certain companies from the ability to influence the choice and elaboration of the standard ( 1 ). The greater the likely market impact of the standard and the wider its potential fields of application, the more important it is to allow equal access to the standard-setting process. However, if the facts at hand show that there is competition between several such standards and standard-setting organisations (and it is not necessary that the whole industry applies the same standards) there may be no restrictive effects on competition. Also, if in the absence of a limitation on the number of participants it would not have been possible to adopt the standard, the agreement would not be likely to lead to any restrictive effect on

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<sup>4</sup> L 316/12 Regulation (EU) No. 1025/2012 of the European Parliament and the Council of 25 October 2012 On European Standardisation, Amending Council Directives 89/686/EEC And 93/15/EEC And Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC And 2009/105/EC Of The European Parliament And Of The Council And Repealing Council Decision 87/95/EEC And Decision No. 1673/2006/EC of the European Parliament and of the Council, Section 2 of the Preamble, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:316:0012:0033:EN:PDE>.

<sup>5</sup> Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm#ann3\\_sp](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#ann3_sp).

<sup>6</sup> The Standards Development Organization Advancement Act of 2004, Pub. L. 108–237, 118 Stat. 661, Sec. 103. Definitions (June 22, 2004) <https://uscode.house.gov/statutes/pl/108/237.pdf>.

competition under Article 101(1) (2). In certain situations, the potential negative effects of restricted participation may be removed or at least lessened by ensuring that stakeholders are **kept informed and consulted** on the work in **progress including proposed changes to the governance rules and policies** (3). The more transparent these procedures are, the more likely it is that the adopted standard will take into account the interests of all stakeholders.

*“For the purposes of this paragraph, the term “standard setting process” refers to all processes related to the preparation, adoption and **application** of standards, including the creation and revision of governance rules and policies, including IPR policies, related to standard-setting.”*

Since bold font is used elsewhere in paragraph 295, we suggest it be used in this addition too.

### **Balancing the guidelines to recognise hold-out, not only hold-up, and to recognise FRAND as a two-way street**

While the Guidelines are, and should be, geared towards horizontal agreement patterns only, they do nonetheless explicitly make reference to an exemplary theoretical concern of IPR being used by supposedly “holding-up users”.<sup>7</sup>

The current Guidelines’ text, however, does not recognise the flip-side of this, where efforts may lead to patent “hold-out” by users, i.e. strategic infringement and/or a proprietary technology user's choice not to negotiate in good faith towards taking a licence, because such delay works in its favour. Such delay artificially raises the costs of contributors to standards and reduces their ability to continue to invest and spend in R&D and costly participation in open standards that promote competition. As a result, hold-out delays innovation and chills incentives to invest in standards development. Standards development, in turn, is overall pro-competitive because it reduces barriers to market entry and increases interoperability (the Guidelines have recognised these pro-competitive attributes).<sup>8</sup>

Having been issued in 2011, the nine years since their issuance have regrettably seen a significant growth in hold-out (and patent infringement more generally) on behalf of technology users around

<sup>7</sup> Guidelines at paragraph 269.

<sup>8</sup> Guidelines, paragraph 263 recognizing and describing the “significant positive economic effects” of collaborative industry standards, including “encouraging the development of new and improved products or markets and improved supply conditions”. The Guidelines further recognize that “Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers).”

the globe. Multiple courts have recognised the existence of hold-out.<sup>9</sup> Hold-out can distort competition by tilting the competitive playing field against contributors to open industry standards.<sup>10</sup>

In July 2015, the Court of Justice of the European Union (CJEU) issued its decision in *Huawei v. ZTE* (“CJEU Decision”).<sup>11</sup> The CJEU Decision did not choose to frame the discussion only in terms of “hold-

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<sup>9</sup> See e.g. 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) <https://essentialpatentblog.lexblogplatform.com/wp-content/uploads/sites/64/2013/07/337-TA-794-Commission-Opinion-Public-Version.pdf>, at 62–63 (“Apple’s submission to the Commission...indicates that Apple has no intention of paying Samsung any royalties until after the conclusion of litigation... Apple’s position illustrates the potential problem of so-called reverse patent hold-up, a concern identified in many of the public comments received by the Commission. In reverse patent hold-up, an implementer utilizes declared-essential technology without compensation to the patent owner under the guise that the patent owner’s offers to license were not fair or reasonable. The patent owner is therefore forced to defend its rights through expensive litigation.”). Despite the finding, the issuance of an exclusionary order in that matter was disapproved by a U.S. Trade Representative Letter [https://ustr.gov/sites/default/files/08032013%20Letter\\_1.PDF](https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF). However, that letter did not “revisit the [International Trade] Commission’s legal analysis or its findings based on its record.” and that it was “not an endorsement or a criticism of the Commission’s decision or analysis.”

*Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-bbc, slip op. at 5 (W.D. Wisconsin Nov. 8, 2012) (dismissing matter after finding Apple was not willing to accept court’s FRAND rate). See in FTC Commissioner Maureen Ohlhausen’s dissent in the Google-MMI consent order (2013) <https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaohlhausenstmt.pdf>.

Case No. 6:10-CV-473 *Ericsson Inc. v. D-Link Systems Inc.* (E. Dist. of Texas) (Aug. 6, 2013) Memorandum Opinion and Order, at 51 (The matter was appealed to the Federal Circuit on different grounds) <https://law.justia.com/cases/federal/district-courts/texas/txedce/6:2010cv00473/125363/615/> and <https://cases.justia.com/federal/district-courts/texas/txedce/6:2010cv00473/125363/615/0.pdf?ts=1411580477> (“RAND licensing also includes an obligation to negotiate in good faith. This obligation is a two-way street. As potential licensees in a RAND negotiation, Defendants [led by intervener Intel] possessed an obligation to negotiate in good faith and earnestly seek an amicable royalty rate. They failed to do so.”). The case was appealed on different grounds - the FRAND findings were not appealed.

Case No. HP-2017-000045 *TQ Delta v. ZyXEL Communications* [2019] EWHC 745 (Pat), paras 12 and 13 (19 Febr. 2019) <https://www.bailii.org/ew/cases/EWHC/Patents/2019/745.htm> (“In the evidence before me, I accept that this is a case of “hold-out” by ZyXEL. They have not paid any royalties to TQ Delta (or any other patent holder) in respect of any standards essential patent. ... infringement of the...[p]atent has been established, and has been continuing for many years. ... They have refused to “agree to submit to the outcome of an appropriate [RAND] determination” and yet have claimed the benefit of the RAND undertaking; c.f. *Unwired Planet* at [54] (supra). I bear these facts in mind when considering whether an injunction should be granted in the present case. ... [Avoiding an injunction] would enable ZyXEL to benefit from their strategy of hold-out, including their refusal to submit to the outcome of an appropriate RAND determination, whilst still seeking to benefit from the RAND undertaking”).

<sup>10</sup> See also Matthew Heim, The focus in Europe moves from patent hold-up to hold-out (IAM, 24 January 2020) <https://www.iam-media.com/frandseps/hold-out-europe-recent-evidence-and-its-impact>.

<sup>11</sup> Case C-170/13 *Huawei Technologies Co. Limited v. ZTE Corp.* (Fifth Chamber, 16 July 2015) available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30ddec4f949241db44d296cc9739f41099c5.e34KaxiLc3qMb40Rch0SaxuRa3j0?text=&docid=165911&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=747013>.

up,” despite the fact that the concept is found in paragraph 269 of the Guidelines and was expounded to the Court in both written pleadings and at the oral hearing.

The CJEU does, however, reference the potential problem of “excessively low royalties (a ‘reverse hold-up’ situation)” and recognize “grounds of equality of treatment between the beneficiaries of licences..., and the infringers.” In addition, the Court was not content with focusing solely on the proposed “notion of the infringer’s ‘willingness to negotiate’” as the test, rather choosing to conclude “certain qualitative and time requirements must be imposed in order to ensure that the applicant for the licence is acting in good faith”<sup>12</sup>

The CJEU’s balanced analysis recognised the problem of ‘reverse hold-up’ and that FRAND is a two-way street.<sup>13</sup> It clarified repeatedly that infringers should not use “*delaying tactics*.”<sup>14</sup> This analysis is not reflected in the Guidelines, since they were issued more than four years before the CJEU Decision was issued.

In light of the above, we recommend a revision of text in Chapter 7 of the Guidelines by adding the following text below paragraph 269, which aims to follow the language of the CJEU Decision:

*“Equally, the pro-competitive benefits of IPR in standard development may be undermined by users of a standard “holding-out” from accepting terms, offered by a holder of IPR essential to a standard, which provide effective access to that standard, as set out in paragraphs 283 to 285. In such cases, an IPR holder who prevents access, for example through a court injunction, generally cannot violate Community competition law where a user of the standard is unwilling to negotiate or does not act in good faith with the aim of concluding a licence to such IPR, such as by using delaying tactics to avoid taking a licence. Hold-out can be anti-competitive, deterring innovation and participation in pro-competitive standards development. Since competition law focuses on the competitive process as a whole, equal treatment and weight should be applied to the licensing conduct of both IPR holders and the users of the standard who may benefit from the FRAND Commitment.”*

### **Collusive exercise of buyer power (monopsony power)**

In 2008, DG COMP summarised the Commission’s position at the time on buyer power in a written submission to the OECD Competition Committee<sup>15</sup> (“OECD Submission”). This submission explains to the OECD that “there are certain potential situations where buyer power can lead to a competition problem if it has an effect on competition on the sales market – either in terms of higher prices or loss of choice or quality (for instance if there is significant supplier exit).”<sup>16</sup> It also observed that “[i]f the

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<sup>12</sup> *Id.*, Section 38.

<sup>13</sup> The notion of FRAND as a two-way street was also acknowledged by the U.S. Court. See *Ericsson Inc. v. D-Link Systems Inc.*, supra note 10, (“RAND licensing also includes an obligation to negotiate in good faith. **This obligation is a two-way street.** As potential licensees in a RAND negotiation, Defendants [led by intervener Intel] possessed an obligation to negotiate in good faith and earnestly seek an amicable royalty rate. They failed to do so.”) (emphasis added). The case was appealed on different grounds, related to jury instructions.

<sup>14</sup> *Id.* at §§ 65-66 and 71.

<sup>15</sup> DAF/COMP/WD(2008)80 Roundtable on Monopsony and Buyer Power – Note by the European Commission (13 October 2008)

[https://ec.europa.eu/competition/international/multilateral/2008\\_oct\\_buyer\\_power.pdf](https://ec.europa.eu/competition/international/multilateral/2008_oct_buyer_power.pdf)

<sup>16</sup> *Id.* at Section 7.

supply side is competitive but the demand side is oligopsonistic, then all other things equal, high buyer concentration generally results in lower purchases below the competitive level.”<sup>17</sup>

The text of the Guidelines, however, does not yet capture this important element of collusionary exercise of buyer (monopsony) power (except in passing in paragraph 45). That failure creates a significant substantive gap, because collusionary monopsony power can significantly distort competition. The addition of such language would help DG COMP address such scenarios where they arise, as well as improve predictability for stakeholders reading the Guidelines. It may also improve international competition policy convergence, as the U.S. Department of Justice Antitrust Division has recognised, the significant anti-competitive effects that may arise from collusionary exercise of buyer power.<sup>18</sup>

It would make the most sense to close the gap by adding this element to the opening “purpose and scope” section of the Guidelines, which “sets out the principles for the assessment under Article 101.”<sup>19</sup>

### Using the correct terminology: Standards Development – not Standard-Setting

The correct nomenclature under European Law is “standardisation”<sup>20</sup> or “standards development.”<sup>21</sup> Standards, especially in the ICT industry, are “developed” through an iterative process in “standards development organisations” such as the European Telecommunications Standards Institute (ETSI). In

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<sup>17</sup> *Id.* at Section 9.

<sup>18</sup> See, e.g., Assistant Attorney General for Antitrust, Makan Delrahim, “Don’t Stop Thinking About Tomorrow” : Promoting Innovation by Ensuring Market-Based Application of Antitrust to Intellectual Property (Nov. 7, 2017), <https://www.justice.gov/opa/speech/file/1170241/download> (“the Antitrust Division recognizes that concerted action among implementers or innovators at the same level of the supply chain could constitute an antitrust violation. Implementers could use their collective power in standard setting bodies to create a monopsony effect, driving down licensing rates. Conversely, patent-holders could exert power through joint monopolistic conduct that drives up licensing rates. We will not and should not hesitate to take action in these circumstances”).

<sup>19</sup> Guidelines, paragraph 1.

<sup>20</sup> See e.g. L 316/12 Regulation (EU) No. 1025/2012 of the European Parliament and the Council of 25 October 2012 On European **Standardisation**, Amending Council Directives 89/686/EEC And 93/15/EEC And Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC And 2009/105/EC Of The European Parliament and of The Council And Repealing Council Decision 87/95/EEC And Decision No. 1673/2006/EC of the European Parliament and of the Council, Section 2 of the Preamble, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:316:0012:0033:EN:PDF> (“Regulation 1025/2012”) (emphasis added).

<sup>21</sup> Regulation 1025/2012, Article 7 (“increased **development of standards**”); Article 10 (“**development** of voluntary European standards with the aim of facilitating compatibility”); Article 19 (“**development** of European or international standards for goods and technologies”); and in numerous other places throughout this Regulation.

The WTO Technical Barriers to Trade (TBT) Agreement, to which the EU is a signatory, similarly uses the term “standards development” – see for example the preamble to the TBT Agreement (“Desiring therefore to encourage the **development** of such international standards”), or Annex 3 thereto, Article F (“the standardizing body shall use them...as a basis for the standards it **develops**”), Article H (“make every effort to achieve a national consensus on the standards they **develop**”), and Article J (“A standard is under preparation from the moment a decision has been taken to **develop** a standard until that standard has been adopted. ... A notice of the existence of the work programme shall be published in a...publication of **standardization** activities. The work programme shall for each standard indicate ...the stage attained in the standards **development**) [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm#articleII](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#articleII).

such a process, multiple technologies are developed, combined and revised, before they go into a standard together (in other words, it is not always the case that one technology is adopted over another). Standards are therefore not “set” in “standard setting organisations”. Similarly, the law of the U.S. and other jurisdictions consistently uses the term “standards development.”<sup>22</sup>

We therefore urge the Commission to bring the nomenclature of the Guidelines in line by refraining from using the word “set” or “setting” in the context of consensus standards and using the words “develop” or “development” instead. This would be done by replacing references to “set/setting” with “develop/developing” repeatedly throughout Chapter 7 of the Guidelines.

To the extent the Commission believes standards-setting is a separate category from standards-development, there is still no justification for failing to mention standards development. The solution we would propose would be to explain in a footnote in the first place, in which the current Guidelines reference “standard-setting” and the revised Guidelines would refer to “standards development” that:

*“Throughout these Guidelines, the term “standards development” refers to both “standards development” and “standards setting”.*

Currently the place to add this text would be in the footnote to paragraph 269 of the Guidelines which first makes reference to the term “standards-setting”.

### Essential patents do not necessarily confer market power

As noted, overall the Guidelines’ language remains accurate and helpful today as it was in 2011. In this regard, we would like to offer specific support for the existing language of paragraph 269 which reads:

*“However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis.”*

We believe this language remains accurate and supported. It is also consistent with the 2015 CJEU Decision, in which the Court had the opportunity to weigh into this area but chose not to, because in that case the existence of a dominant position was not contested. Furthermore, in the international context, it is also consistent with antitrust law across the Atlantic.<sup>23</sup>

<sup>22</sup> U.S. Statutes and guidelines in this area include e.g. the competition law statute the Standards **Development** Organization Advancement Act of 2004, Pub. L. 108–237, 118 Stat. 661. (June 22, 2004) <https://uscode.house.gov/statutes/pl/108/237.pdf>; The U.S. equivalent of Regulation 1025/2012, OMB Circular A-119, that speaks of “standards development organizations(SDOs)” Office of Management and Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities 81 FR 4673 (January 27, 2016) at 6 and 7 <https://www.govinfo.gov/content/pkg/FR-2016-01-27/pdf/2016-01606.pdf>; The National Technology Transfer and Advancement Act of 1995, 13(d), 15 U.S.C. 272, Pub. L. No. 104-113, 110 Stat. 775, 783 (1996), <https://www.nist.gov/standardsgov/national-technology-transfer-and-advancement-act-1995> (“standards that are **developed** or adopted by voluntary consensus standards bodies”).

<sup>23</sup> Under U.S. antitrust law, patents and other intellectual property rights should not be viewed as necessarily

Thank you for your consideration of these comments.

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conveying market power. *See Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* (2017) §2.2 [https://www.ftc.gov/system/files/documents/public\\_statements/1049793/ip\\_guidelines\\_2017.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf). During the Obama administration's 2016 review of these guidelines, the U.S. competition agencies were lobbied to revise that text, but consciously chose not to revise it. In the specific context of Essential Patents, there is similarly no resumption that they create market power but, rather, market power must be established in each case basis, *see ChriMar Systems, Inc. v. Cisco Systems*, 72 F.Supp.3d 1012, 1019 (N.D. Cal. 2014) (rejecting the argument that "to the extent that the...Patent is essential to the 802.3af and the 802.3at standards, no viable technology substitutes exist and ChriMar has monopoly power over the [relevant] [t]echnology Market"; explaining instead that there are other necessary elements that need to be proven "in order to prove market power").