

Submission to the European Commission Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co- operation agreements

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Executive Summary

The Stockholm Network's input to this consultation is focused on standardisation agreements. Fundamentally, we want to emphasise that any discussion on standard-setting agreements should seek to balance the promotion of competition and innovation. We believe both should be equally important goals of standardisation, and importantly, we believe standardisation efforts play an important role in encouraging both competition and innovation. Furthermore, the two should not be viewed as mutually exclusive outcomes – indeed, in many cases, the increase of one can encourage the other.

Specifically, the Stockholm Network wants to underscore that standardisation, especially efforts involving intellectual property rights (IPRs), does not necessarily lead to anti-competitive behaviour. We recognise that anti-competitive activities may transpire in the context of standardisation agreements. Nonetheless, we recommend that the role of standards – both proprietary and non-proprietary-based standards – in improving competition continue to be recognised and promoted, especially for the ICT and network fields.

Furthermore, we want to emphasise that IPRs by definition are not the source of anti-competitive activities; the source of the problem is rather the actors who utilise IPRs. Therefore, we recommend that the consultation make a distinction between IPRs and anti-competitive behaviour that may occur in the context of IPR-related activities.

Finally, the Stockholm Network wants to highlight the potential difficulties that may arise in efforts to formalise so-called best practices for the use of IPRs in standardisation agreements (see the conditions for “safe harbour” from Article 101(1)), such as the FRAND commitment and *ex ante* patent disclosure. In particular, we raise several situations in which implementing and enforcing such practices may prove to be both unfeasible and undesirable. We recommend greater collaboration between standard setting organisations (SSOs) and IP-related bodies, such as patent offices, with the goal of creating a more appropriate framework for all of the actors involved in standardisation agreements.

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1.1 About the Stockholm Network

The Stockholm Network (SN) is the leading pan-European think tank and market oriented network.

It is a one-stop shop for organisations seeking to work with Europe's brightest policymakers and thinkers. Today, the Stockholm Network brings together more than 130 market-oriented think tanks from across Europe, giving us the capacity to deliver local messages and locally-tailored global messages across the EU and beyond.

Combined, think tanks in our network publish thousands of op-eds in the high quality European press, produce many hundreds of publications, and hold a wide range of conferences, seminars and meetings. As such, the Stockholm Network and its members influence many millions of Europeans every year.

1.2 About the SN IP and Competition Programme

The Stockholm Network Intellectual Property and Competition Programme was established in January 2005.

Dealing with the field of intellectual property across the board (including in its monthly bulletin – Know-IP™), the Programme aims to achieve three key objectives:

First, to make the field of intellectual property more mainstream as well as accessible to the general public. It seems that, currently, the field of intellectual property, despite having huge economic, social and political implications to the public as a whole, is considered esoteric, technical and to some extent 'grey'. This gap should be bridged.

Second, to increase the interaction between specialists focusing on different aspects of intellectual property rights. A positive effect of the growing importance and impact of the IP field is professionalism and specialisation. This, however, also leads to an undesirable detachment between different elements and themes of IP, which are becoming more and more "divorced" from each other. For example, copyright, patent and trademark specialists, as well as those dealing with the legal, economic and political aspects of IPRs, seem to operate on parallel tracks. A more active debate between IP specialists will help us to obtain

more comprehensive and up-to-date information about developments in the IP field as a whole.

Finally, and perhaps most importantly, the SN IP and Competition Programme aims to encourage discussion, as well as debates, on different burning IP issues. However, such discussions should be as informed as possible. We aim neither to idolise IPRs, nor to demonise them. Rather it is important to see IPRs as a policy toolbox aimed at achieving two social goals: to provide incentives to innovate and develop new knowledge and informational products in the future; and to ensure wide public access to such products in the present.

2 Introductory Remarks: Standardisation, competition and innovation

The Stockholm Network seeks to promote market environments in which both innovation and competition may flourish. In order to optimise both innovation and competition, we believe that policymakers and members of different standards communities should seek to balance many different types of standards creation, including different forms of standardisation agreements.

In particular, standards creation can involve both proprietary (i.e. those transferred or diffused using intellectual property rights) and non-proprietary efforts (i.e. those without exclusive rights attached). It can also involve “closed” and collaborative or “open” efforts. Defining open and closed standards is a highly contested issue among different standards communities. It can refer to the sharing and implementation of standards based on FRAND terms, which, for some, means on a royalty-free basis, and the transparent and consensus-based development of standards. Closed standards are generally understood to be those that are proprietary-based and available exclusively or selectively.

Standardisation agreements between two or more competitors may involve any of these different types of standards creation. Depending on the circumstances, all of them – including open as well as proprietary-based standards – are legitimate and important. Opening standards to the public, informally or via a formal agreement within the industry, can allow for greater competition in implementation and the development of new and better standards and end products. The release of standards to the public by companies and

individuals allows other companies or bodies to modify and implement the standards to develop technologies and end products, in some cases free of charge. Proprietary-based standards are important for incentivising the creation of path-breaking innovations and market standards. This can include efforts that are driven primarily by one or two leading competitors or by the licensing of a particular standard to other companies or standard setting organisations. The Stockholm Network wishes to emphasise that both kinds of standards are crucial for maintaining forward momentum in the development of information, communication and network technologies. Furthermore, open standards, even open source standards, are compatible with proprietary standards and, in many cases, they work together.

Although we are interested in a range of competition issues, the Stockholm Network's response in this case will refer mainly to issues related to standardisation. Therefore, the following sections address specific topics raised in Section 7 of the consultation paper.

3.1 Balancing the perspective of competition in the scope of standardisation agreements

In Section 7.3.1 (Paragraphs 259-262), the consultation paper has identified four main competition concerns surrounding standardisation agreements. First, standardisation agreements may provide a forum for competitors to arrange price agreements and as a result, restrict price competition. Second, identifying certain technical specifications as standards, as part of a standardisation agreement, may effectively cap the scope for technical development and innovation within that product or service. Third, the participation of a limited number of stakeholders in standardisation agreements may mean that the selection of a technology or technologies as standards may be biased towards the stakeholders' own interests. Fourth, the use of intellectual property rights (IPRs) as a platform for diffusing standards may allow rights holders to control the resulting product or service market. Furthermore, they may use patent control to delay or burden competitors and implementers, either financially (through high royalties) or legally (through patent infringement litigation).

While all these concerns are valid, the Stockholm Network would like to emphasise that the consultation should adequately take into account the key role that standards have in increasing competition, especially in the ICT and network fields.

As technology moves into increasingly complex territories, competing companies are inclined to establish a common ground with the goal of creating a widespread level of compatibility and quality among different or competing technologies. Not least in the ICT fields, which involve rapid innovation and a great deal of vertical specialisation, standards offer a shared language that technologies use to communicate with one another and allow for greater interaction between products or components. This can mean improved interoperability, interconnectivity and commoditisation – all buzzwords for a more beneficial market. Hence, in many cases, particularly in the ICT field, limiting the number of available technical specifications is valuable, even necessary, for further competition in the product or service market. It is also worth noting that standards across different country borders can break down barriers to trade and create a large common market for businesses and consumers to participate in, whilst also reducing the regulatory burden on companies.

Furthermore, there are plenty of examples in which the establishment of industry standards has unlocked innovative efforts above and around these standards. For instance, the creation of IBM PC as the standard for personal computers allowed for the establishment of Microsoft's Disk Operating System (MS-DOS), and the subsequent graphical user interface Windows 95, as the standard operating system. In addition, innovative efforts based on the existence of a standard or standards may result from "open" or free access to standards or they may also result from proprietary or "closed" standards. In this context, the consultation paper indicates that in some cases, proprietary-based standards that are "*de facto* controlled by one or more stakeholders" can allow these companies to "control ... the product or service market to which the standard relates", with implications for possible abuse of dominant market position (Paragraphs 261-2) The consultation paper seems to suggest that this type of control can lead to an abuse of market position, particularly with regard to the ability to introduce follow-on innovations with more incremental features. Yet at the same, it may also be the case that this kind of environment (and proprietary-based models) best incentivises the development of certain path-breaking or radical technologies. Therefore, the consultation should seek to balance incentives for both incremental and more radical innovation, as well as for non-proprietary and proprietary based efforts.

3.2 Implementation concerns regarding IPR-related requirements for “safe harbour”

Before addressing specific issues in standardisation agreements associated with IPRs, the Stockholm Network would like to address a terminological problem noted in several paragraphs of Section 7 of the consultation paper (see, for example, Paragraph 262): IPRs are sometimes directly linked with so-called anti-competitive practices, as if IPRs inherently lead to these practices. In fact, the Stockholm Network would like to emphasise that IPRs by definition are not the source of the anti-competitive activities discussed in this section. Rather, IPRs on their own simply act as a platform for transferring standards, in such a way that rights holders have an economic incentive to develop new technical standards. IPRs themselves do not necessarily translate into problematic royalties or litigation. Such activities are instead a factor of the actors who implement or are involved with the implementation of IPRs. Hence, it is important that the consultation make a distinction between IPRs and potential ways of exercising IPRs; it would be highly ineffective to attempt to address anti-competitive behaviour in standardisation agreements at the expense of IPRs themselves.

The Stockholm Network would also like to address conditions for the “safe harbour mechanism” discussed in Section 7.3.3. Paragraph 276 and the following paragraphs lay out conditions under which standardisation agreements could be considered to fall outside the scope of Article 101(1). The two main conditions discussed here are commitments by rights holders to (1) “good faith disclosure”, in which they “make reasonable efforts to identify existing and pending IPR reading on the potential standard” before the standard is agreed (Paragraph 281) and (2) “FRAND”, in which all holders of “essential IPR ... provide an irrevocable commitment in writing to license their IPR to all third parties on fair, reasonable and non-discriminatory terms” (Paragraph 282).

While these commitments are often *de facto* practiced among various standard setting organisations, and while in theory it sounds good to establish these commitments legally, the Stockholm Network would like to emphasise that implementing such doctrines across the board will be difficult.

First, defining the key terms can be very tricky in practice. This is demonstrated in other cases, such as with the “essential facility doctrine”. Establishing broad definitions tends to create disputes about, for instance, what reasonable disclosure of IPRs would mean. Second, standardisation agreements cannot be fitted into a single box – for example, how would FRAND and disclosure commitments be ensured for a standard that is held by various IP owners, especially if one or more parties are not identified prior to the standardisation agreement? The Stockholm Network believes that the time and money wasted in resolving these disputes and complexities is often greater than the benefit that may be derived from establishing general terms and conditions.

Beyond concerns about the feasibility of creating doctrines of FRAND and patent disclosure, the Stockholm Network also believes that the consultation should be wary of over-restricting IP-related practices. Making practices like FRAND an obligatory component of standardisation agreements acts as a type of compulsory license on rights holders, not only in the requirement to license but also in the terms of license. While it is one thing for a standard setting organisation to choose a standard based on FRAND conditions, it is entirely another to force an innovator to make decisions *ex ante* about future licensing activities. Choice and flexibility are cornerstones of competition and should remain important components in standardisation efforts. In our view, creating compulsory conditions for standard setting agreements risks hurting both innovation and competition.

Given the concerns about feasibility and desirability of establishing general requirements for standardisation agreements, the Stockholm Network recommends that the consultation seek to balance the inputs of standard setting organisations and IPR bodies. We suggest that increased dialogue should be encouraged between SSOs and IP-related organisations, such as the European Patent Office. We think that the creation of a joint mechanism between these two fields may perhaps lead to the creation of a more viable framework for implementing conditions along the lines of FRAND and patent disclosure, one that recognises the value of IPRs alongside other factors of competition, as well as maintains incentives for innovation. Ultimately, we believe the consultation should ensure that it effectively balances the inputs and incentives for both competition and innovation in promoting standardisation efforts.