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IPR-RELATED COMMENTS ON THE COMMISSION CONSULTATION REGARDING THE REVISION OF THE RULES FOR THE ASSESSMENT OF LICENSING AGREEMENTS FOR THE TRANSFER OF TECHNOLOGY UNDER EU COMPETITION LAW

Protection of intellectual property (IP) is key to boost Europe's economic growth, innovation, technical progress and consumer welfare.

This has been recently endorsed by the European Commission's Industrial Policy Communication for growth and economic recovery (2012), where it is stated that "*IP rights which cannot be enforced are meaningless*" (page 20).

Technology transfer agreements are essential to ensure the largest possible use of technologies developed by a company that does not want or cannot use them fully or in part on its own in the territories concerned. The conclusion of licensing agreements contributes to economic development, employment, innovation and R&D. Usually they are based on intellectual property rights, in particular patents obtained on the technology. The licensing of these rights is the backbone of the agreement between the owner of the technology (licensor) and the one who will implement it (licensee).

The principle of a block exemption regulation clarifying at least to a certain extent how competition rules will apply to technology transfer agreements is key to ensure legal certainty for their conclusion to the benefit of the European economy, growth and employment.

We regret therefore the approach taken in the current proposal for a revised block exemption regulation to treat technology transfer agreements with suspicion and increase the risk that technology transfer agreements are considered noncompliant a posteriori.

Therefore, we would like to highlight our concerns on the following IPR-related issues in the draft technology transfer block exemption regulation ("TTBER") and accompanying Guidelines:

- Nothing is done to reduce the uncertainty in terms of market share thresholds, a criterion whose equivocal and hindering of their technology transfer activity character companies have been denouncing. In some respects, the current system is aggravated by an extension of the recourse to the 20% threshold (see in particular Article 3.2 of the draft).
- The exclusion of termination clauses allowing the licensor to terminate the agreement if the other party challenges the validity of the patent covering the licensed technology from the scope of the block exemption regulation is a step

backwards and could hinder the conclusion of technology transfer agreements. The licensee, like every third party, is fully entitled to contest the validity of a patent being granted to him with a license. However, giving him the extra possibility to do this under the shelter of the license introduces an unjustified imbalance among the technology transfer partners to the disadvantage of the licensor.

- The proposed change to consider all exclusive grant back and assign back clauses of severable and non-severable improvements as excluded clauses could also impede with the development of technology transfer. The current system with the distinction between severable and non-severable improvements offers a pragmatic approach. Any change would increase the uncertainty in the conclusion of technology transfer agreements and could lead to licensors declining to license out their technology, preferring to maintain control over improvements by using the technology in-house only.

In this context, we would recommend that the current system would either remain unchanged concerning the above-mentioned issues or would be modified in a way favourable to the development of technology transfer.

Finally, the new approach taken in the guidelines (particularly in paragraphs 223 and 227) on patent settlements is worrisome, both in itself and through the use of excessively broad and unclear wording, such as the reference to any kind of inducement, financial or otherwise, for the licensee to accept restrictions. As a result a situation could be created in which Member State court litigation would be required to determine whether a settlement agreement can legitimately be concluded between two parties in a patent dispute. This would significantly hamper the conclusion of settlements to avoid or terminate patent disputes.
