

DIF comments on the European Commission “White Paper on Modernising ICT Standardisation in the EU – The Way Forward”

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The Digital Interoperability Forum (DIF) is a cross-sector association of global players involved in the pay TV delivery chain (transmission, hardware, software, middleware, platform operation and content provision), facilitating the availability of content across multiple platforms and devices. DIF members are: **BSkyB, Canal+, Conax, Deutsche Telekom, Irdeto, Liberty Global, Microsoft, Nagravision, NDS, Pace, Qualcomm, Sky Deutschland, Sky Italia, Viaccess** and **Zetacast**. DIF members are actively involved in standards creation organisations such as DVB, Cable Europe Labs... and many are also members of standards bodies, such as ETSI.

DIF notes that the terms “standard” is used in different ways and it would be helpful for the Commission to clarify more precisely those which would be addressed in its modernised approach to standardisation. DIF sees three tiers of standards:

- Standards which have been approved by a standards body such as ETSI, CEN or CENELEC (“the ESOs”) in the EU;
- Standards and specifications created by formal, established, multi-stakeholder consortia such as the DVB and Cable Europe Labs which are generally submitted to a standards body for approval; and
- Specifications developed by groups of industry players outside the formal consortia and not subject to those consortia procedures.

Standards and specifications -- de facto, proprietary, or from recognized standards bodies (“open”) -- are used by DIF members in their businesses. They are selected on the basis of their business, technological and commercial requirements and in recognition of public interest requirements, e.g. regarding the environment and consumer health and safety. DIF members understand that standards, whether developed on a proprietary basis or through a consortium such as the DVB, play a critical role in the development of any market. A properly conceived standard encourages multiple stakeholders to develop and deploy the standard and provides a stable environment that encourages them to evolve their technology and business models over time and across multiple markets. In this context, it is important to emphasise that the markets in which DIF members are engaged are generally global in nature, and very dynamic; and the standards they select must be, as far as possible, applicable beyond the EU boundary.

Conversely, any standard which attempts to shape the market rather than reflect it, or favour certain stakeholders at the expense of others, is likely to foster discontent rather than cooperation, discouraging long-term investments and future innovation - ultimately to the detriment of end users.

DIF’s comments on the questions in the questionnaire are below.

KEY ASPECTS OF THE MODERNISATION OF ICT STANDARDISATION IN THE EU

Attributes of ICT standards associated with EU legislation and policies

As a general remark, DIF believes strongly that standards should be driven by, in particular, business requirements and not regulatory diktat. Successful standards encourage rather than force cooperation and should win adoption based on merit, innovation and relevance to stakeholders, in competition with similar standards. It is these properties that will ensure that the adopted standards have the necessary attributes for continuing successful deployment. Thus, the public policy, legislative or regulatory agenda should not generally become the driver for determining the attributes of standardisation beyond the ESOs.

However, if, in exceptional circumstances, public policy needs can justify the imposition of a standard, then DIF agrees that, as a minimum, the attributes identified by the Commission are essential, but that they always should be proportionate, justifiable and based on a sound assessment of the market.

*(a) **The Commission suggests** that these attributes be integrated in the future ICT standardisation policy:*

- (1) **Maintenance: Ongoing support and maintenance of published standards, including swift adaptation to new developments which prove their necessity, efficiency and interoperability, is guaranteed over a long period.***

Standards reflect industry agreement in a given market in support of the development and innovation of their businesses at a point in time. As conditions change, many standards require timely modifications to maintain their market relevance and stakeholder support. A slowly or poorly maintained standard becomes an impediment rather than an enabler. It is a pre-requisite that standards are provided relevant ongoing support and maintenance and can adapt swiftly to changing requirements. Failure to do so will cause the benefits of the standard to be lost or any problems associated with its implementation to be slow in being resolved.

In DIF's view standards bodies have significant bureaucratic inertia, which can leave them poorly placed to provide timely responses to market developments. In addition, generalist organisations may be insufficiently familiar with the variety of implementations which occur to fulfil their role efficiently. The goal of a standard is to achieve wide adoption, and many adopters may not even be directly involved with the standards institutions. This characteristic of standards these bodies means that careful consideration should be given to reverting to formal industry consortia for the maintenance and support of standards. Also, in considering adoption of standards from other fora and consortia (*see (h) below*), careful thought should be given to the ongoing lifecycle and specifically the mechanisms for the maintenance and bug fixing of such standards.

- (2) *Availability: Resulting standards are publicly available for implementation and use at reasonable terms (including for a reasonable fee or free of charge).*

DIF agrees that standards adopted by a standardisation institution should be readily accessible to potential implementers for a reasonable fee. However, when discussing standards-related costs, the fee for access to a standard should be clearly differentiated from those associated with its implementation. All standards, whether proprietary or open, embody IPRs which have to be recognised and rewarded. Failure to do so will discourage the future development of standards and the willingness of industry players to offer their best solutions during standards creation. The fact that a standard is open does not mean it is free and a “reasonable” fee does not mean that the cost will be low. However, insofar as a standard is being driven by public policy or legislative considerations it is imperative that the cost to industry of deploying a standard must be fully assessed.

In addition, despite the best efforts of standards bodies, no one can ever guarantee that a particular standard is free of undeclared third-party intellectual property rights which must, ultimately, be rewarded. Practically, deploying any standard entails cost and these can sometimes be hard to know at the time the decision is taken to use the standard, even for a supposedly “open” standard.

- (3) *Intellectual property rights: IP essential to the implementation of standards is licensed to applicants on a (fair) reasonable and non-discriminatory basis ((F)RAND), which includes, at the discretion of the IPR holder, licensing essential IP without compensation.*

DIF supports the principle of (F)RAND being applied to standards adopted by standards bodies. However, as noted in the introductory comments, DIF members use standards which are capable of being deployed on a global basis. Hence, it is important to consider the consistency of IPR rules globally.

That said, it is worth pointing out that European competition law lays down rules as to when IPR holders can be required to license their property on (F)RAND terms. The mere inclusion of particular IPR in a standard does not and, as far as DIF is aware, could not create a mandatory licensing system within the current European IPR and competition regime.

An additional important factor is the timeliness of disclosure of IPR which is discussed further (2) above and (g) below.

- (4) *Relevance: The standard is effective and relevant. Standards need to respond to market needs and regulatory requirements, especially when those requirements are expressed in standardisation mandates.*

For standards to be successfully adopted by industry players they must be effective and relevant. The market will reject standards which do not have these attributes. It is the market, and ultimately the benefit to consumers, not regulatory requirements, which should determine the success of a standard.

However, where there is deemed to be a possible regulatory need for the use of a standard, this need must be assessed through effective, transparent consultation with industry, full impact assessment, etc. Mandating and referencing of standards must only occur where it is the best possible solution and justified on the basis of substantive evidence and where the action is proportionate. Regulatory intervention, and in particular, the referencing of specific standards, has a considerable effect on the market place. The history of regulatory intervention provides adequate proof that policymakers are not best placed to make technology or business model choices.

For example, HDMAC – supported by the Commission and subject to a Directive – failed to stimulate high definition television, with alternative technology being selected by key players – and the business proposition only becoming realistic many years later. Similarly, almost 20 years ago Eurocrypt was promoted as a single standardised conditional access technology solution for content protection. Its widespread use could have potentially lowered the costs of providing conditional access but hackers had ready access to the Eurocrypt’s protection approach – and it was hacked before it was even deployed. These, and other examples of technology standards driven by regulatory requirements, illustrate the very real danger of economic failure when using standards that are not market driven by technical relevance and effectiveness for business needs.

(5) *Neutrality and stability: Standards should whenever possible be performance oriented rather than based on design or descriptive characteristics. They should not distort the (global) market and should maintain the capacity for implementers to develop competition and innovation based upon them. Additionally, and in order to enhance their stability, standards should be based on advanced scientific and technological developments.*

DIF supports the proposition that standards must not distort the global market and must accommodate innovation and competition between implementations. The ICT industry is one of the most international and EU players would be hampered by restricting their choice of standards to only those approved by an EU standards body. Innovation delivers a competitive advantage and this can only be of benefit to the EU’s goals for the ICT industry and consumers. Standards must be specified in a way which facilitates this.

Standards are chosen for what they can help deliver for business and ultimately to the consumer. In that sense they are objective- and performance-oriented rather than design-driven.

In this context it is, of course, important to have regard to advanced scientific and technological developments, but a degree of caution should be exercised. The timescales encapsulated in such developments often exceed those business uses of a standard: adopting a standard with greater longevity than the business horizon may add cost, undermines its effectiveness, etc.

- (6) *Quality: The quality and level of detail are sufficient to permit the development of a variety of competing implementations of interoperable products and services. Standardised interfaces are not hidden or controlled by anyone other than standard setting organisations.*

DIF agrees that an approved standard has to be capable of being implemented in variety of ways and that facilitating interoperability is an important goal for any standard or specification, whether proprietary or open. However, for the reasons set out in the response to (1) DIF is concerned that resting control of standards and interfaces in a standardisation body may be insufficiently flexible for, and responsive to, industry's needs and timescales.

The use of ICT standards in public procurement

- (b) ***The Commission suggests** updating the public procurement provisions of Council Decision 87/95/EEC so that public authorities can more easily acquire ICT services, applications and products that fulfil their specific requirements and in particular an adequate level of interoperability.*

DIF is generally supportive of measures that assist public authorities with the efficacy and efficiency of public services. However, DIF is mindful of the economic influence of the public sector, and would be opposed to any public procurement requirements that effectively result in indirect regulation of activities beyond public procurement.

- (c) ***The Commission suggests** clarifying that when they are defined within the context of ICT strategies, architectures and interoperability frameworks, the implementation of standardised interfaces can be made a requirement in public procurement procedures, provided the principles of openness, fairness, objectivity and non-discrimination and the public procurement directives are applied.*

No additional comment.

Fostering synergy between ICT research, innovation and standardisation

- (d) ***The Commission suggests** regularly consulting standardisation and research stakeholders, in particular ETPs, to ensure that relevant European research initiatives contribute most effectively to ICT standardisation activities.*

By contributing to ICT standardisation activities, global and EU research initiatives play a crucial role in fostering innovation and competitiveness. Dialogue between the Commission and research groups is to be encouraged but care should be taken to ensure that all relevant stakeholders and contributors are consulted directly to ensure that any research is aligned to industry's interests. In other words, standardisation activities should not be heavily influenced by academic research, which is divorced from business requirements, and conversely such research should not be constrained by standardisation activities.

*(e) **The Commission suggests** that standardisers adapt their procedures where necessary to ensure that contributions from research organisations, consortia and projects facilitate the timely production of ICT standards.*

The timely production of ICT standards is well-understood by DIF members who are actively engaged in standards creation consortia such as DVB. An important and integral part of the work of such consortia is to define the commercial requirements and then to develop the standard based on those requirements. The resource which is then committed to the development of the standard reflects the urgency or otherwise of the need for it. DIF supports the view that a standardisation body's timetable should acknowledge the time to market required by industry.

*(f) **The Commission suggests** that Member States consider a similar approach to any ICT R&D initiatives at national level.*

See response to (d) above.

Intellectual property rights in ICT standards

DIF believes that this is the critical area in this consultation and welcomes the further Commission consultancy study on this topic. However, DIF also considers that the treatment of IPR in ICT standards is not an issue which the EU can address in isolation from other countries. DIF would encourage considering this issue mindful of the global dimension IPR and ICT standards.

*(g) **The Commission suggests** that ICT standards developing organisations should, subject to competition law and respecting the owner's IPR:*

- *implement clear, transparent and balanced IPR policies which do not discriminate and allow competition among different business models,*

DIF agrees with this statement. It is important that IPR holders are rewarded and it is also fundamental that IPR holders are aware of, and respect, the IPR policy of a standards developing body. It is equally important that a publicly-approved standard should be implementable on (F)RAND terms: it is not the role of standards bodies to prefer or favour one business model over another. DIF also notes that the regulatory imposition of specific standards and/or business models distorts the market and exacerbates issues around IPR licensing.

- *ensure the effectiveness of procedures for IPR disclosures,*

DIF agrees that there is a need to reduce the level of legal and commercial uncertainty surrounding IPR and central to this is the disclosure process. Consideration should be given particularly to the timeliness of the formation of any patent pool and voluntary declaration of IPR interests. Industry participants engage constructively with standards bodies in forming and adhering to IPR policies recognising that - when standards containing undisclosed IPR are deployed - this can lead to subsequent demands for licence fees which undermine the original economic decision to use the standard. Standardisation participants support and follow through

on (F)RAND commitments because - once a standard is deployed - it can be difficult, if not impossible, to remove any element whose IPR costs are found subsequently to be commercially unacceptable.

However, these factors are of particular importance in the case of mandating the use of standards (but apply more generally also). Although DIF maintains that such an event should be rare and not the rule and is generally not in the interest of industry or consumers, DIF contends that any policymaker be substantially aware of the IPR costs associated with the standard before even contemplating such an intervention. Lessons can be learned from the MHP standard. DIF members regard its near-mandation as a cautionary example that illustrates both the complexities of IPR licensing in design-oriented standards, and the market-distorting consequences of mandation. In retrospect, the full cost of licensing MHP was unacceptable to the market, and considered discriminatory by pay TV operators. The lack of widespread adoption of MHP confirms its mandation would have been disastrous.

- *consider a declaration of the most restrictive licensing terms, possibly including the (maximum) royalty rates before adoption of a standard as a potential route to providing more predictability and transparency.*

In some cases there may be a benefit in considering this approach, though any review and decisions on IPR policies should be fully in the hands of standards bodies and their membership consistent with applicable competition and other law.

Integration of fora and consortia in the ICT standardisation process

(h) The Commission suggests enabling the referencing of specific fora and consortia standards in relevant EU legislation and policies subject to a positive evaluation of the standard and the forum or consortium processes with regard to the attributes list as described in Chapter 2.1.

DIF understands this proposition to refer to standards and specifications developed by groups outside the normal standards creating bodies, such as DVB. DIF observes that the current EU approach to referencing standards does not generally admit solutions put forward by organisations such as W3C or IETF. This is unjustified, given the critical role that such organisations have played in the development of the Internet, e-mail and the World Wide Web. Significant innovation continues to be accomplished globally regarding the delivery of content and services via multiple platforms and devices. DIF believes, therefore, that in the first instance consideration should be given to widening the range of bodies whose deliverables can be recognised to those institutions outside the EU which develop market-relevant standards in areas not covered by ETSI, CEN and CENELEC. Given the number of such bodies which exist, the wide variety of character, purpose and procedures, and their interest in self-governance some caution needs to be exercised in referencing standards created by other groups such as ad hoc industry fora. Also, there will need to be some transparency and accountability and an inclusive approach in the Commission's decision making process in an area that will have tremendous impact on the market.

(i) **The Commission suggests** promoting better cooperation between consortia and ESOs on the basis of a process which would lead to standards issued by the ESOs.

DIF is supportive of cooperation between various consortia and ESOs, providing that such cooperation is done on a level playing field. It is not clear to DIF members what form the Commission's promotion might take, other than to address the concerns and objectives associated with (h) above.

Enhancing dialogue and partnership with stakeholders

(j) **The Commission suggests** the establishment of a permanent, multistakeholder, ICT standardisation policy platform (with a wider membership than the Member State SOGITS Committee previously established by Council Decision 87/95/EEC) to advise the Commission on all matters related to the European ICT standardisation policy and its effective implementation.

DIF supports this proposal and would be pleased to bring its members' knowledge and expertise to such a platform.

(k) **The Commission suggests** inviting the ESOs and other ICT standard developing organisations to review the function and composition of the current ICTSB to make it more efficient.

DIF suggests that such an exercise would benefit also from input from industry, who are the ultimate consumers of almost all ICT standards.