For Globally Competitive Standardisation in the Digital Single Market: EARTO Voting Recommendations to Support Innovation in Europe

16 March 2017

EARTO, the network of over 350 Research and Technology Organisations (RTOs), would like to put forward voting recommendations ahead of the upcoming discussions and vote in the European Parliament:

- on the **Draft Report on "European standards"[1] by IMCO Committee MEP Marlene Mizzi**,
- on the **Draft Opinion on "European standards" by ITRE Committee MEP Hans-Olaf Henkel,**
- and on the **Draft Report on "Digitising European Industry" by ITRE Committee MEP Reinhard Bütikofer.**

RTOs are non-profit research organisations with public missions to support society. Their work range from basic research to new products and services development. They are trusted and critical partners at the core of innovation hubs: cooperating with industries, specifically SMEs, and with a wide array of public actors.

With the support of its Working Group Legal Experts, EARTO prepared this document urging MEPs to support amendments which stand for pro-interoperability on the Digital Single Market (DSM) and pro-standardisation, both in favour of valuing investments in European RD&I. We also call on MEPs to reject amendments undermining Europe's economy and innovation ecosystems.

1. The EU should boost effective standardisation efforts as a potential prerequisite for the DSM

Europe leads the way in fostering efficient and interoperable standards. This continues to drive innovation, promote competition, and facilitate interconnectivity, allowing citizens to benefit from constantly improving performance, choice, and price. Internet of Things (IoT), 5G and industrial internet are expected to bring billions of new connected devices. Interconnecting all these devices will place even more emphasis on standards in the DSM. The EU has established ambitious plans for an efficient DSM. The success of the DSM depends on Europe maintaining its leading role in the creation, development and deployment of the technologies needed to drive 5G networks, the Internet of Things, and the industrial internet.

2. The EU should support *collaborative* standardisation efforts and discourage the development of "de facto" standards

Standardisation allows European companies to participate and cooperate with others so they can compete on a global scale. It also allows research organisations to participate and cooperate in this collaborative process. There are different types of standards:

- Standards developed by players and governed by Standard Setting organisations (SSOs) are, by their very nature, collaborative, and, in this sense, "open". Even when standards are developed in partnership between research organisations and companies without the help of SSOs, e.g in pure software developments, these are also collaborative standards, and hence "open" standards. It is important to bear in mind that the word "open" can have several meanings when used in the standards' context. By providing an irrevocable undertaking to make the standard essential patents developed in SSO fora available on fair, reasonable and non-discriminatory (FRAND) terms, the standards are also "open" for licensing. Information regarding standard essential patents are also "open" for review and analysis through databases created by SSOs.
- "Proprietary standards", on the other hand, are standards that have been set by single companies and that are followed by similar manufacturers due to their market and bargaining power. These are rather "de facto" standards controlled by single companies. Naturally, they are never governed by SSOs. While these proprietary "de facto" standards play a part in the DSM, it is generally considered that they are "closed", ultimately leading to consumer lock-in, fewer choices and higher prices.

According to the definition of (collaborative) standardisation, market players voluntarily contribute their intellectual property, market insight and other expertise to the creation of global competitive standards, fulfilling governments' objectives, for the benefit of society and industry. Standardisation can only be successful if there are the right incentives for companies (large and small), universities and research organisations (including Research and Technology Organisations (RTOs)) to make such contributions.

(Collaborative) standardisation provides the greatest potential for access to all. The most attractive standards, with the highest performing technologies, can only be developed and evolve if incentives are maintained for collaborative, voluntary and consensus-based standardisation efforts to contribute to valuable RD&I and related expertise. The alternative to collaborative standards is more *de facto* standards set by single companies. The impact on the DSM architecture would most likely lead to consumer lock-in, fewer

[1] Implementation of Regulation (EU) No 1025/2012 (2016/2274(INI))

choices and higher prices. We would see a world of fragmented, incompatible technologies. Performance, capabilities and interconnectivity would suffer.

The EU should promote the right incentives for all entities to collaborate and contribute their expertise to IoT, 5G and the industrial internet (collaborative) standardisation efforts, and discourage the development of "de facto" standards which would hinder the development of the DSM. Removing or reducing incentives for collaborative standards would create an imbalance and hamper the ability of European companies to cooperate with others to achieve the scale necessary for global competitiveness.

3. The EU should not dilute the incentives provided by FRAND licensing

A vital ingredient behind the phenomenal success of 2G, 3G and 4G mobile standards is FRAND licensing. FRAND has provided the investment incentives which have made these collaborative standards so successful. It has also ensured access and market entry for all players. Indeed, mobile standards provide a very attractive open ecosystem for new devices, apps, networks and business models, upon which many companies – large and small - build commercial success. Diluting the incentives provided by FRAND licensing would be detrimental to the DSM.

- Financial returns from FRAND licensing can be invested to develop new technologies for standards. FRAND licensing creates a virtuous circle ensuring continued investment and re-investment in new technologies, infrastructure, and employment. This, in turn, guarantees the evolution of standards and their future viability.
- FRAND is and must remain a two-way street. This means that the rights and obligations must flow to and from licensors and licensees alike. This has been confirmed by the Court of Justice of the European Union in the decision of *Huawei v. ZTE*, which provided an analysis of European law vis-à-vis international licensing negotiations pertaining to standard essential patents. On the one hand, the licensors who have given a FRAND undertaking allow their standard essential patents to be accessible to all. Such licenses are available on fair, reasonable and non-discriminatory terms. The determination of license fees is generally agreed to be based on the connectivity value proposition which the patented technology brings to an end-product, rather than the full consumer value of the end-product. On the other hand, licensees must undertake due diligence prior to product launch and must, in any case, conclude any required FRAND licenses quickly. A framework which encourages the conclusion of FRAND licenses in a timely and efficient manner is the basis of successful implementation of collaborative standards.
- Current European and national-level incentives for innovation are also relevant for standardisation and the DSM. Universities and research organisations have in place or are encouraged to have internal reward policies for their researchers, enabling them to gain a part of the royalties earned by their employer. Diluting the incentives for FRAND licensing would therefore not only demotivate universities and research organisations to participate in collaborative standardisation for the DSM, but it would also undermine their reward policies and disincentivise researchers. In some Member States, rewarding individual researchers by enabling them to gain a part of the royalties earned by their employer is even mandatory by law. Therefore, diluting the incentives for FRAND Licensing would also go against these laws.
- Diluting the incentives for FRAND licensing would also oppose EC's recommendation for an effective exploitation of research results. For instance, in its Recommendation on the management of Intellectual Property in knowledge transfer activities and Code of Practice for Universities and other public research organisations (2008), the EC states the need to *"provide appropriate incentives to ensure that all relevant staff play an active role in the implementation of the IP policy […] Therefore, clear rules and measures need to be set up on e.g. the distribution of the financial returns (which could partly be given to inventors as an incentive) to the extent that this issue is not otherwise covered by national legislation."* In its Resolution on the management of intellectual property in knowledge transfer activities and on a Code of Practice for universities and other public research organisations (10323/08) of May 2008, the Council endorsed this recommendation and code of practice, inviting Member States to support them. In order to follow-up and promote the implementation of this Recommendation and Code of Practice, a monitoring and reporting system[2] has been set up by EC. The final report of this monitoring and reporting system has shown that Member States made significant and fruitful efforts to take this recommendation and code of Practice into account, including the incentives for researchers. The final report[3] demonstrated that many Member States, included those highly ranked in the EC Innovation Union Scoreboard, had an overall high level of implementation of this recommendation and of this Code of Practice in 2012 (examples: UK 87%; DE 78%; DK 71%; FI 68%; FR 64%). As stated in the report, additional efforts should be made to increase these first encouraging results.

Globally diluting the incentives for FRAND licensing would demotivate many stakeholders, be they universities, research organisations or industrial companies, to participate in the development of

[2] http://www.knowledge-transfer-study.eu/home.html
[3] Source: June 2013; "Knowledge Transfer Study; 2010-2012; Final Report". Deliverable 5 related to Service Contract N° RTD/Dir C/C2/2010/SI2.569045

collaborative standards for the DSM. It would increase the development and the adoption of *de facto* proprietary standards controlled by a few single companies. This would be contrary to the objectives of the European Commission and the European Union, hindering the development of the DSM.

Recommendations
EARTO urges EU to promote the development of, and contribution to, technologies for 5G, IoT and industrial internet standards. This requires a balanced framework which sees all participants and stakeholders complying with the rule of law, the law itself, and international commercial norms. This will create interoperable, globally competitive, and evolutionary technologies, made accessible on FRAND terms. More businesses can participate. More products can interconnect. Citizens can benefit. The DSM can then meet its full potential.

IMCO Committee Draft Report by MEP Marlene Mizzi on the "European standards - implementation of Regulation" (EU) No 1025/2012 (2016/2274(INI))

EARTO calls upon the European Parliament:
- **to support the following amendments submitted by IMCO: 24, 41, 54, 65, 82, 89, 135, 145**
- **to reject the following amendments submitted by IMCO: 10, 11*, 22, 35, 52, 57, 63, 72, 84, 85, 87, 90, 91, 92**

Full list of amendments

*Moreover, proposed amendment 11 would be dangerous for the European innovation ecosystem and for industry. There is a real risk that it would seriously hinder public procurement and go against EP's Directive 2014/24 on Public Procurement and the Charter of Fundamental Rights of the European Union. Indeed, it favours one business model against all other business models for software, and appears to penalise certain business models. EARTO calls on EP not to put in place unsustainable proposals and to stay in line with Europe's foundations for the DSM, strictly avoiding to discriminate against all forms of intellectual property. All business models can co-exist and will collectively contribute to meeting the DSM's objectives for the benefit of society, as well as consumer choice, market demand and public procurement.
In France for instance, 90% of French software publishers chose the proprietary software model to finance their RD&I and would be de facto excluded from public procurement[4]. This is certainly also the case for all other Member States.

ITRE Committee Draft Opinion by MEP Hans-Olaf Henkel on "European Standards"

EARTO calls upon the European Parliament:
- **to support the following amendments 4, 8, 37, 38, 104, (as set out in Draft Opinion), 113, 116, 119, 125**
- **to reject the following amendments 93, 95, 109, 110, 111, 118, 121, 122**

Full list of amendments

ITRE Committee Draft Report by MEP Reinhard Bütikofer on "Digitising European Industry"

EARTO calls upon the European Parliament:
- **to support the following amendments 84, 160, 242, 260, 277, 281**
- **to reject the following amendments 65, 98, 195, 259, 261, 262, 263, 272, 278**

Full list of amendments

RTOs **- Research and Technology Organisations**
From the lab to your everyday life. RTOs innovate to improve your health and well-being, your safety and security, your mobility and connectivity. RTOs' technologies cover all scientific fields. Their work range from basic research to new products and services development. RTOs are non-profit organisations with public missions to support society. To do so, they closely cooperate with industries, large and small, as well as a wide array of public actors.

EARTO **- European Association of Research and Technology Organisations**
Founded in 1999, EARTO promotes RTOs and represents their interest in Europe. EARTO network counts over 350 RTOs in more than 20 countries. EARTO members represents 150.000 of highly-skilled researchers and engineers managing a wide range of innovation infrastructures. www.earto.eu

EARTO Working Group Legal Experts: is composed of 25 corporate legal advisers working within EARTO membership. Established in autumn 2013, this Working Group has also worked for instance on the revision of the State-Aid Rules & the GBER and on Open Data. Our experts also contributed to the setting-up of the DESCA Consortium Agreement model for Horizon 2020.

[4] http://www.syntec-numerique.fr/sites/default/files/related_docs/etude_open_source_sn_cnll_2015_-_presentation.pdf