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Standardisation and the Commission's new horizontal guidelines

Marcus Glader · Thursday, November 4th, 2010

The European Commission is currently preparing new guidelines for the assessment of horizontal cooperation agreements under Article 101 TFEU. A draft was presented for public consultation in May this year and the final version is [expected before year's end](#). The section on standardisation agreements has been updated in the light of recent experiences (such as Rambus, Qualcomm and IPCOM). Here are a few thoughts on this controversial part of the Commission's draft:

- Similar to the current (2001) Horizontal Guidelines, the new draft adopts a “safe harbour approach”, outlining requirements under which cooperation on standards would generally not result in a restriction of competition and thus fall outside the scope of Article 101(1) TFEU altogether. In this respect, the Commission suggests that standard setting organisations (SSOs) should ensure unrestricted participation by all relevant players, transparent and non-discriminatory procedures, and access to the resulting standard on fair, reasonable and non-discriminatory terms.
- A safe harbour approach is typically useful for formal SSOs and other standardisation initiatives with broad industry participation. As a practical matter, the greater the influence of the participating companies and the greater their commitment to the resulting standard, the more likely it is that restricted participation in the standard setting process, bias in the decision-making procedures, or restrictions in the availability of the resulting standard would restrict competition from excluded or otherwise disfavoured parties. Such foreclosure effects could occur both at the technology market level (competition for inclusion in the standard) and at the implementation level (competition between standard-compliant products and services).
- Open models are therefore appropriate to ensure that the co-operation remains pro-competitive, particularly for SSOs comprised of important industry players that aim to develop standards for wide implementation in the industry. However, not least given the growing number of specialized fora and *ad hoc* consortia active in the development of potential standards, it would be useful if the Commission, in addition to the safe harbour, developed a more general, effects based framework for the competition law assessment. The current draft provides little concrete guidance on how the Commission would assess whether individual standards agreements fall under Article 101(1) TFEU and, if so, under which circumstances such agreements would benefit from the exception in Article 101(3) TFEU due to expected efficiencies and consumer benefits. This is something the Commission could usefully expand upon in the final version, drawing on precedents such as the [X/Open decision](#).

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- The Commission’s draft guidelines state that in order to avoid hold-ups and abusive royalty rates, SSOs should have a clear and balanced IPR policy that prescribes (i) good faith *ex ante* disclosure of IPRs that might be essential for the standard under development and (ii) irrevocable written commitments by all holders of essential IPR to license their IPR to all third parties on FRAND terms.

 - In the context of standards, joint ventures and patent pools, Article 101(3) TFEU may require that third parties are provided access on FRAND terms. (See e.g. the [2003 Technology Transfer Guidelines](#), §§ 167 and 226; [Salora-IGR Stereo Television](#), [Eleventh Competition Policy Report](#) (1981), para. 94) For industry standards, FRAND licensing is in many situations a balanced approach, safeguarding both the incentives to innovate/contribute and the availability of the standard for implementers.

 - However, in the software and industry sectors in particular there is a strong proclivity towards royalty-free standards (whether explicitly in the SSOs IPR rules as is the case for the W3C or as a practical matter as is the case for several other successful SSOs). Experience shows that royalty-free models can encourage participation and has proven to be essential to fundamental web standards and other similar technologies. Recognition of the fact that royalty-free and FRAND licensing may be appropriate for different SSOs in different contexts would also be a useful addition to the final version of the guidelines.

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