



European Commission

Competition

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Standards and IPR *- in light of the Horizontal guidelines*

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(Speaking in a personal capacity - the views expressed are not necessarily those of the European Commission)



Growing relevance of standards

Economic importance of standards

- Globalising, knowledge-based economy
- More and more products work together
- Particularly important in IT/communications

Increase in competition issues



Legal/economic analysis

Horizontal Guidelines

- Recognise the benefits of standardisation
- Subject to conditions
 - Transparency of process
 - No restrictions that are not indispensable
 - Available to all who wish to work the standard



Potential Article 102 issues

- Standards may confer market power
 - Depends on importance of standard in market
 - Depends on lock-in (sunk costs, network effects)
 - Relevance of « but for » scenario
- Issues raised in past cases
 - Patent ambush (Rambus)
 - Non-respect of FRAND (Qualcomm)
 - Transfer of FRAND commitment (IPCom)



Guidance

- Prevention better than cure
 - Encourage standards bodies to have clear rules
 - Recognised standards bodies vs. ad-hoc fora
- Role of anti-trust agencies not to prescribe choice of scheme



Horizontals Review – State of Play

- Draft texts adopted by the College in May 2010
- Public consultation from 4 May to 25 June 2010
- 119 comments (114 non-confidential on website including summary)
- Final texts adopted on 14 December 2010



Standardisation – public consultation

- Raised a lot of interest among stakeholders
- Majority welcome additional guidance
- But need for further clarification – in particular:
 - No “one size fits all”
 - Need for further guidance if outside “safe-harbour” plus no presumption of illegality
 - Approach to royalty-free?
 - FRAND benchmarks – many for, some against
 - Ex ante declarations of maximum terms – mostly welcomed but...



Standardisation – Outcome I

- Restriction of competition by object if:
 - Part of broader restrictive agreement aimed to exclude (e.g. incumbent producers collude to exclude new technology)
 - Ex ante disclosures of most restrictive licensing terms used as a cover to fix prices downstream or of substitute IPR or technology (i.e., bid-rigging)



Standardisation – Outcome II

- “Safe harbour” regarding standard-setting process retained:
 - No obligation to comply
 - Unrestricted participation for competitors
 - Transparency for the wider circle of stakeholders
 - Effective access to the standard
 - If relevant: clear and binding IPR policy (refined)



Standardisation – Outcome III

- More guidance when outside safe-harbour: no presumption of illegality – individual assessment.
- Factors to analyse, e.g.:
 - Free to develop alternative standards/products?
 - Access to the standard?
 - Participation in the standard-setting process?
 - Market shares of products based on standard?



Standardisation – Outcome IV

- Guidance on ex ante disclosure of “most restrictive licensing terms” (including maximum royalty fees) and
- Benchmarks for assessment of level of FRAND in case of dispute (in particular confirming ex ante – ex post benchmark) retained



Conclusion

- Benefits of standardisation recognised
- Standards bodies to design effective rules
- Ideally, competition authority should not need to intervene in individual cases
- Horizontal Guidelines is there to offer guidance



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Thank you for your attention

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