

## **CONSULTATION ON HORIZONTAL COOPERATION AGREEMENTS**

### **CBI response – 25 June 2010**

The CBI appreciates the opportunity to comment on the Commission's draft Guidelines. We have focussed our comments on restrictions or ambiguities which we consider could cause difficulties for business were the Guidelines to be issued in their present form.

Since information exchanges and standardisation are now covered by the Guidelines we have also concentrated our review on these new areas.

#### **INFORMATION EXCHANGES**

##### **Paragraph 82 – publicly available information**

We are concerned that the explanation of “genuinely public information” is unduly restrictive. We believe the qualifications of equally easy and costless are difficult to interpret in practice. Costless means a zero cost, whereas the guidance explains that the information is no longer genuinely public if the costs of collection are discouraging; in other words, the costs are material and above zero.

We suggest that the concept to be applied is that the information is readily available. In our view, the cost of collecting the information is likely to be relatively insignificant in the vast majority of cases.

It would be helpful if the guidance could explain that information obtained by researching publicly available websites will be considered genuinely public information.

##### **Paragraphs 88 & 58 - benchmarking**

Benchmarking against best practices in the industry is a most important driver of efficiency. It is right that this practice is recognised and we suggest it could be further encouraged in this guidance.

##### **Paragraph 92 – companies' intentions**

The requirement that companies need to be committed to announce the true value of their intentions is difficult to understand and we suggest needs further clarification.

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### **Paragraph 101 – Example 4 – benchmarking benefits**

As the example explains, the object of the exchange agreement is to benchmark best practices in order to increase efficiency. It does not therefore have the object of the prevention, restriction or distortion of competition. Whether it has this effect appears questionable and it is not obvious on the limited facts that it is likely to lead to a restriction of competition as suggested.

Because of the importance of benchmarking in driving efficiency, we propose that this example is rewritten to show instead how Article 101(3) can be fulfilled. This would provide positive and constructive guidance to companies engaged in this common practice. Even in such a concentrated market, if the costs data is anonymised and rankings provided through a third party could this not meet the conditions of Article 101(3)?

## **STANDARDISATION**

### **Paragraphs 281 & 282 – disclosures of essential IPR**

We support the direction in paragraph 281 that there should be a good faith disclosure by companies participating in standards setting of essential patent rights. We understand the aim is to avoid later patent ambushes which could amount to an abuse. It is important though that in seeking to address this potential problem, the Guidelines do not create difficulties for every company involved in standards setting.

There are several problems with this broad guidance which we identify :

- i. IPR includes trade secrets which do not form part of a publicly available standard.
- ii. Software and interface protocols are subject to copyright whose scope may be difficult to determine in practice.
- iii. Patent applications must generally remain confidential and may remain confidential for a period of time during their filing.
- iv. New technology may be developed in parallel at different centres within a company and it can be difficult to determine how this emerging technology reads on the standard being developed.

We propose therefore that this guidance is restricted to requiring a good faith disclosure of IPR which can be determined from publicly available filings. This will cover patents, patent applications which have reached the disclosure stage and design rights.

Paragraph 284 warns that there can be an infringement of Art.102 through an abuse of market power by virtue of an IPR being included in a standard and we consider that this should be sufficient guidance to companies that good faith is required when participating in standards setting. We believe it is preferable to emphasise this principle throughout the Guidelines, rather than applying more prescriptive rules.

**Paragraph 282 – FRAND licensing**

We should point out that national controls on the export of technology may make it impossible to license a company's IPR to all third parties.

**Paragraph 288 – inclusion of substitute technologies**

We have some doubts whether the inclusion of substitute technologies in a standard is likely *as a general rule* to restrict competition and believe it would be helpful to explain more fully how this conclusion is reached.

**Paragraph 307 – participation by all competitors in the market**

We agree that all competitors should be reasonably enabled to participate in the setting of the standard. This should be bounded by the normal considerations of non-discrimination and reasonableness.

**Paragraph 316 – Example 2**

We propose some rewording of this example on the lines of our comments above about the disclosure of IPR.

The example states that there is no general requirement for FRAND licensing but, if not, that there is a risk of an infringement of Art.101(1). We consider guidance in this form to be preferable to that in paragraph 282 which requires IPR holders to make an irrevocable commitment in writing to license their relevant IPR to all third parties on FRAND terms.

**CBI 25 June 2010**