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**EUROPEAN COMMISSION CONSULTATION**  
**DRAFT GUIDELINES ON HORIZONTAL CO-OPERATION AGREEMENTS -**  
**STANDARDIZATION SECTION**

The Section on standardization agreements in the new Draft Guidelines on Horizontal Co-operation Agreements (the “Draft Guidelines”) is longer and more detailed than the corresponding part of the respective 2001 Guidelines and, as the subject is important, this is welcome, as there is a need for guidance and rules by the European Commission to avoid a growing number of competition law disputes. In particular, it is valuable that the Draft Guidelines make clear that an agreement to adopt a standard is usually incompatible with Article 101 TFEU if it does not provide access to that standard on fair, reasonable, and non-discriminatory (“FRAND”) terms (para. 277). However, a general issue under the Draft Guidelines is that, while most of the principles stated therein are in our view correct, they remain somewhat unclear as to whether these principles are truly binding, what they mean precisely, and what happens, as a matter of competition law, if parties do not observe them. In addition, there are a number of important points that we suggest including and a number of specific issues that could usefully be clarified.

**I. The Guidelines Should Clarify the Legal Consequences under Article 101 TFEU of a Failure to Grant FRAND Licenses**

The Draft Guidelines correctly make clear that an agreement to adopt a standard must ensure access to that standard on FRAND terms in order to be compatible with Article 101 TFEU. They are, however, less clear on whether the FRAND licensing requirement relates to the application of Article 101(1) TFEU, *i.e.*, whether a standardization agreement containing a FRAND licensing obligation is deemed not restrictive of competition (see para. 277), or whether it is a requirement for the exemption under Article 101(3) TFEU (see para. 314), which we think is the right view, in particular in cases where use of the standard is indispensable to compete in the downstream market be it for legal or factual reasons. Para. 277 should therefore be clarified in this regard. The issue is of importance with respect to the burden of proof in a dispute on whether proposed terms are FRAND or not, as discussed below.

Most importantly, the Draft Guidelines do not address the legal consequences under Article 101 TFEU if a participant in a standard-setting fails to fulfill its obligation to license technically essential patents on FRAND terms. If such a patent owner refuses to grant FRAND licenses, or offers them only on discriminatory or unreasonable terms, competition on the downstream market is likely to be eliminated or distorted to the detriment of the consumer. Once a standard has been adopted and is practiced, it would not be enough in such a situation, even if it were legally correct, to suggest that the agreement to adopt the standard would be void under Article 101(2) TFEU, because such a conclusion would have no economic effect (no “*effet utile*”) and would not remedy the anti-competitive effect of the refusal to license on FRAND terms. The standard would still exist, and users of the standard would be locked into it. Applying Article 101(2) TFEU would also be disproportionate, since

it would mean that a single holder of a standard-essential patent that did not license on FRAND terms could render the whole standard void, even though all other participants to the standard-setting had fulfilled their FRAND licensing obligation.

***FRAND licensing obligation under Article 101 TFEU.*** The prohibition under Article 101 TFEU to participate in standardization proceedings and conclude standardization agreements that do not give access to third parties on FRAND terms applies not only to the standardization organization, but also to each individual participant. Consequently, by refusing to grant a license to a standard essential patent on FRAND terms, a participant commits a violation of Article 101 TFEU. While the act of refusing the license may seemingly be unilateral, it is directly related to, and occurs in the context of, the standardization procedure and the agreement on the standard.

Article 7 of Council Regulation 1/2003 empowers the Commission to require a party infringing Article 101 TFEU to bring the infringement effectively to an end and impose the necessary remedies in this regard. National competition authorities have the same right, and most national laws provide for similar remedies in private actions. As the violation of Article 101 TFEU brought about by a refusal to license on FRAND terms with respect to a standard that is existing and implemented can only be remedied through the grant of a FRAND license, there is an enforceable FRAND licensing obligation under Article 101 TFEU.

While the Draft Guidelines refer several times to Article 102 TFEU when discussing violations of the FRAND licensing obligation, they should also address the role of Article 101 TFEU in this context. Although a patent owner might well be in a dominant position and would probably abuse that position by failing to license on FRAND terms, the obligations under Article 102 TFEU may be different from those under Article 101 TFEU, and enforcing an obligation to license under Article 102 TFEU could be more controversial and time consuming. At the very least, the Commission should reserve the right to require patent owners to license on FRAND terms, so as to ensure the *effet utile* of Article 101(3) and of a remedy pursuant to a decision finding a breach of Article 101(1) TFEU.

***Differences between applying Article 101 and 102 TFEU.*** There are important differences between applying Article 102 TFEU, which prohibits unfair pricing and applying dissimilar conditions to equivalent transactions, and enforcing the FRAND licensing obligation under Article 101 TFEU. Article 102 TFEU requires proof that the standard-essential patent confers a dominant position. This is only the case if the patent is unavoidably practiced when the standard is used, *i.e.*, if it is “essential,” and if the use of the standard itself is essential to compete in the downstream market. Article 101 TFEU applies even if there is no dominance, provided that some market power is obtained (collectively) as a result of the agreement on a particular standard.

Most importantly, the holder of a standard essential patent bears the burden of proof under Article 2 of Council Regulation 1/2003 that its license terms are FRAND, since, as suggested above, the FRAND licensing requirement should be considered derived from Article 101(3) TFEU. If a competition authority accuses a holder of a standard essential patent who has participated in a standard-setting procedure of infringing Article 101 TFEU by not licensing on FRAND terms, or if a party seeks a license for a standard essential patent and there is a dispute about whether the license terms offered by the patent holder are FRAND, it is only necessary for the competition authority or the license-seeker to show that the standard brings about a restriction of competition within the meaning of Article 101(1)

TFEU. It is not necessary to prove in addition that the license terms offered by the patent holder are not FRAND. It is the duty of the patent holder to show that the conditions of Article 101(3) TFEU are fulfilled and that the terms of its offer are FRAND. This is a fair allocation of the burden of proof, notably regarding the non-discrimination requirement since it is usually easier for the holder of an essential patent to prove that a subsequent offer is in compliance with its previous licensing practice, which will often be unknown to a license seeker.

There is no duty to grant a compulsory licence under Article 102 TFEU unless the refusal would be an abuse. Absent discrimination, there is no duty to licence under Article 102 TFEU merely because the license would reduce a restriction of competition and create more competition downstream. This is different from Article 101 TFEU, where the duty to licence standard essential patents is automatic if the conditions are fulfilled, because the parties cannot legally refuse to give others advantages they got for themselves by agreement, if the advantages are important enough. A duty to license on FRAND terms is important in particular also to enable access to the market for firms who do not (yet) own essential patents in the standard, but who might innovate in complementary areas.

Finally, another difference – discussed in more detail below – is that a “fair and reasonable” royalty rate under Article 101 TFEU might be less than the rate that would be traditionally considered to amount to excessive pricing under Article 102(a) TFEU.

***Limitations on injunction proceedings.*** Under Article 101 TFEU, the FRAND licensing obligation should be such that it allows users of the standard to invest and go into production without delay. As the Draft Guidelines recognize, FRAND terms will often not be clear and may ultimately need to be decided by a court. As such disputes often also involve questions of validity of the patent and infringement, their resolution will often take years. If the patent owner could get an injunction until these issues were all resolved, the inability to use the standard would obviously put enormous pressure on the proposed user of the standard to concede to the demands of the patent holder and pay a royalty at a rate substantially higher than FRAND. That would counter the purpose of FRAND licensing obligations under Article 101 TFEU.

Consequently, if the user is in principle willing to take a license and creditworthy, seeking an injunction for the principal purpose of putting pressure on the license-seeker to accept the patent holder’s view on what is FRAND should be considered a violation of Article 101 TFEU. Also, a national court has an obligation under European Union law not to give an injunction, in this situation, because an injunction would be contrary to the patent holders obligation to grant licenses on FRAND terms. In other words, if the national court gives an injunction, it would create a situation that would infringe Article 101 TFEU. National courts have a duty under Article 4(3) TFEU to “*refrain from any measure which could jeopardize the attainment of the Union’s objectives.*”

***Comparison with patent pools.*** It would be helpful if the Guidelines explained that the consequences under Article 101 TFEU of agreements to develop and adopt standards are essentially similar to the consequences under Article 101 TFEU of agreements to form patent pools that contain patents essential for a standard, as determined by the Commission in, among other cases, the *Salora/IGR Stereo Television* case in 1981. Namely, members of an important patent pool use of which effectively becomes essential for access to the downstream market may be infringing Article 101 TFEU if they failed to provide licenses on FRAND terms to undertakings outside the pool.

## II. Suggested Clarifications

**Standards bodies.** European standards bodies are said (in para. 253) to be subject to competition law to the extent that they can be considered undertakings within Article 101 TFEU. The Guidelines should also point out that European standards bodies are associations of undertakings within the meaning of Article 101 TFEU, and that agreements between enterprises to establish standards, adopted in accordance with the procedures of these bodies, are agreements between enterprises that come under Article 101 TFEU if they restrict competition.

**Technically essential patents.** The Guidelines should make clear that the issues regarding FRAND licensing concern only essential patents and not other, non-essential patents.

**Ex ante agreements and unilateral disclosure.** It would be useful in para. 267 to explain more the distinction between agreements between IPR owners on the terms on which they will license their patents, which come under Article 101 TFEU, and unilateral disclosure of the terms on which each owner plans to license, which is normally lawful, as is confirmed later in para. 287.

**Royalty free standard.** The requirement in para. 278 of the Draft Guidelines that IPR policies of standard-setting organizations should contain “*no bias in favor or against royalty free standards*” could be misinterpreted to suggest that IPR policies with a preference for royalty-free standards (such as W3C or JEDEC) are illegal. This cannot be correct, and would be inconsistent with para. 276. An IPR policy requiring royalty-free standards could be seen as a collective boycott of royalty-bearing technology, but equally, an IPR policy allowing royalty-bearing technology is akin to a de facto collective boycott of open source technology. IPR policies with a bias in favor of royalty-free technology should be subject to analysis under a rule of reason or under Article 101(3). There may be circumstances where excluding open source technology restricts effective downstream competition or innovation. The analysis is fact specific, and may be different in different industry sectors (for instance, telecommunications standards that require royalties to fund R&D, and internet or software system-to-system interoperability standards that tend to be royalty-free). Para. 278 should be changed to reflect this explicitly, or at least state more clearly that the Commission leaves this issue open, and that the analysis may differ in different industry sectors.

**Failure to disclose relevant patents.** “Good faith disclosure” of intellectual property rights that might be essential for a standard before the standard is adopted is called for by para. 281, on the basis of “reasonable efforts.” We agree on the importance of such disclosure in order not to deprive the standard-setting organization of the opportunity, which might be important, of considering whether some alternative version of the standard could be adopted that would not involve using the patents in question. However, it would appear desirable if the Guidelines also gave guidance on the legal position under Article 101 TFEU if a standard-setting organization had not adopted such a rule, if participants in the standard-setting ignored the rule, or if standard essential patents were not disclosed despite the company having made a reasonable effort in good faith to detect such patents. It could be noted in this regard that the holder of a standard essential patent who participated in a standardization procedure is under a FRAND licensing obligation under Article 101 TFEU whether or not it has *ex ante* disclosed its patents that might be technically essential, but that the failure to do so might impact on the FRAND royalty rate that it might be entitled to.

Moreover, it is appropriate to make clear (as para. 276 only implicitly does) that the Guidelines should not be read to mean that standards bodies are prohibited from adopting alternative rules suitable to achieve the same effect as a good faith disclosure rule. A standard body may have a rule, for instance, of “negative disclosure” requiring a member to alert the organization within a specific deadline if it has essential patents that it does not wish to or cannot license on FRAND terms, and requiring all members to license all essential patents that were not disclosed within the applicable deadline. Similarly, a good faith disclosure without duty to search, combined with a FRAND promise for all IP the company owns, may be adequate. Para. 316 should be adjusted to provide these examples.

As a related matter, para. 2 of Article 3 of the Draft R&D Block Exemption provides that the parties must agree that prior to starting the research and development, “*all the parties will disclose all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by the other parties.*” This requirement to disclose all background IP is simply not practical. It would require expensive patent searches, and would discourage joint R&D and standard setting. There is no justification for imposing this stricter rule, especially not in “private” joint R&D projects. If it is maintained, it should be limited to formal standards bodies only, or limited only to patents that the R&D partner wishes to withhold from licensing.

***Excessive royalties.*** We agree that a principal means of assessing the appropriate FRAND royalty is by establishing the *ex ante* value, *i.e.*, the royalty that was (or could have been) charged for the patents in question before the standard was adopted (paras. 283-285). It is important to recognize that this may mean that the appropriate rate of royalty may be different for different patents that are all technically essential for the same standard, depending on the extent to which they were exposed to competition from alternative patents and technologies before the standard was adopted.

We also agree with the Draft Guidelines that the evaluation of the *ex ante* value should not be the exclusive method. In addition to the independent expert assessment, some further benchmarks for assessing a fair and reasonable royalty rate should be mentioned: the royalty rate announced before the standard was adopted (if that rate was realistic and not merely an unrealistic “opening bid”), the royalty rate charged by the company in question for the same patents for another standard, or the royalty charged by other companies for similar patents for the same standard or for another standard. The Guidelines should also include a reference encouraging standard-setting organizations to require members to identify the maximum cumulative royalties that they consider commercially viable, at the same time they identify the maximum terms for their own IPR. Royalty stacks for multiple patents that may be essential for a given standard could render use of the standard prohibitively expensive, which would be counter to Article 101(3) TFEU.

We also would suggest that the Guidelines place less emphasis on the traditional non-IP-related definition of excessive pricing under Article 102 TFEU as expressed in the case law when defining “fair and reasonable” royalty rates, and make clear that this could only indicate an upper limit of FRAND. The appropriate FRAND royalty rate under Article 101 TFEU might be less than the rate that would be considered unfair under Article 102(a) TFEU, since the latter has only been applied to situations where a price is appreciably excessive. In cases in which excessive prices under Article 102(a) TFEU have been found, the price was not merely above the relevant benchmark, but was significantly above it, *i.e.*, it was sometimes many times over the respective benchmark. The Guidelines should therefore clarify that the case law under Article 102 TFEU is useful to create a

presumption of unfair or unreasonable pricing, but that licensing terms may not be fair and reasonable even if the case law does not apply.

The Guidelines should recognize that the FRAND obligation is not limited to royalty terms, but may apply to other key terms and conditions. For instance, it may be unfair, unreasonable or discriminatory for a licensor of an essential patent to demand that a licensee transfer its patents to the licensor, or that the licensee allow the licensor and its contract partners to exploit the licensee's patents for free or against an unfairly low remuneration. Such clauses are not *per se* illegal, but may be unfair or discriminatory, may foreclose competition, and may discourage innovation.

**Legal duties of transferees.** We agree with the statement that patent owners should take all necessary measures to ensure that any party to which its patents are transferred is bound by the FRAND licensing commitment (para. 286). Again, it would be helpful if the Guidelines addressed the legal consequences under Article 101 TFEU if the transferor failed to do so. In our view the answer should generally be that the transferee has the same obligations (as a result of Article 101 TFEU) as the transferor, and that these are not dependent on, or capable of being altered by, the contract between transferor and transferee. If this were not the legal position, it would be possible for a transferee to get the benefits of owning patents that have become essential for a given standard through agreement, without the inseparable obligations to license on FRAND terms that are a necessary consequence of the agreement to adopt the standard, which may restrict competition. Since the transferor was part of the standard agreement and the transfer agreement, the transferor should also be liable under Article 101 TFEU for the transferee's breach of the FRAND license duty.

**Benchmark for FRAND licensing practice.** The Guidelines should also clarify what a transfer of the FRAND licensing obligation means with respect to the non-discrimination aspect thereof. If the transferor has granted licenses or made statements or otherwise indicated more precisely what its FRAND rate would be, the transferee should usually be bound by those indications, as well as by a FRAND commitment in general terms. Different considerations might apply in cases where the transferee has a large patent portfolio and a well-established royalty rate that might constitute better evidence of what the FRAND rate is than the evidence about the first owner's royalty.

**Joint negotiations.** Para. 287 could be misread to suggest that joint negotiations are *per se* illegal which we think would be inappropriate. We suggest that the Guidelines indicate that depending on the individual circumstances joint negotiations may be neutral or pro-competitive (especially in situations where the negotiations are with a *de facto* monopolist, or after lock-in), and that while a safe harbor rule is not available, they should be analyzed under Article 101(3) TFEU like other joint buying arrangements.

**Standards with substitute technologies.** The situation of a standard that includes two alternative technologies is discussed in para. 288. The competition concerns brought about by such a situation (if any) might be more clearly spelled out. Generally, we would have thought that the inclusion of alternative technologies in one standard would be pro-competitive as it would give users a choice and put the owners of the respective technologies in competition with each other, provided that the "combined standard" is not a form of disguised price fixing or reduction of competition between the alternatives.

**Compliance testing.** Para. 305 of the Draft Guidelines states that "[s]tandardization agreements that entrust certain bodies with the exclusive right to test

*compliance with the standard, or impose restrictions on marking of conformity with standards, unless imposed by regulatory provisions, go beyond the objective of achieving efficiencies and may not be indispensable to the attainment of these objectives.”* The statement suggests that such agreements are *per se* illegal. However, the appointment of a compliance testing body should be subject to analysis under Article 101(3), and may be appropriate, for example where different entities had a chance to bid for the exclusive role, where the information used for the conformance testing is security-sensitive, or where appreciable economies of scale and scope are achieved. Of course, compliance testing should be neutral, and must always avoid conflict of interest.

**“De facto industry standards.”** We suggest that the Commission emphasizes – preferably at the beginning of the section on standards – that, for the assessment under Article 101 TFEU, technology developed by individual market participants that has emerged as a *de facto* standard in the market place must be distinguished from standards that have been adopted through agreements or cooperative procedures. In this context, it would be helpful to clarify the understanding of the notion of “*de facto* industry standards” as it is used in the Guidelines. *De facto* industry standards of the type just mentioned are not necessarily the subject of any agreement or concerted practice, and therefore Article 101 TFEU may not apply to them.

**Small group standard-setting.** We think the Guidelines should make some reference that it may be appropriate to distinguish between standards formally adopted by large standard-setting organizations (“SSOs”) and standards less formally adopted by smaller groups of companies. The Draft Guidelines seem to have been written primarily with large, formal SSOs in mind, and small less formal groups of companies are mentioned only in para. 314.

While some of the relevant principles of competition law apply both to formally and industry-wide adopted standards and to standards informally adopted by a smaller group of companies if they have sufficient economic effects, it could be inappropriate to require, as a matter of principle, small groups of companies to adopt all the rules and procedures that are appropriate for a large SSO. The development of standards could be delayed and discouraged by elaborate procedural requirements, which might encourage controversies about rules or procedures. Standard-setting by small groups is exempted under the current joint R&D block exemption regulation, or may fall under the *de minimis* rule, and these possibilities should be retained.

Although ideally large SSOs should have clear rules dealing with all the issues that can arise, in a small group of companies set up to discuss a single standard it may matter more whether in fact they were biased, than whether they had begun by adopting rules designed to prevent bias. In innovative markets that have not yet reached a mature stage, single standards are often adopted at first by small *ad hoc* groups of companies, working less formally pursuant to joint R&D or specialization agreements. To require similar rules for all kinds of standard-setting groups would appear inappropriate, and could discourage cooperative innovation and disadvantage new innovative markets, in which the pace of innovation is often the most rapid. The quickest innovation is often carried out by small groups that submit their standards to an official standards organization at a later stage. In this context, a small group of companies meeting to develop a single standard at the early stages may not need to be as open to as many possible participants as a large SSO. It might be most important for the parties to be able to work with companies with similar interests, and not to be obliged to allow in companies whose principal interests might be to obtain confidential

information, or to obstruct or delay a development which would compete with their technology, or to argue for an entirely different approach. For innovation, speed and flexibility are often all-important. This is so in particular when several standards are being developed simultaneously by different groups.

*Environmental Standards.* The Guidelines should recognize explicitly in para. 319 the reduction of pollution (the “internalization” of cost externalities such as environmental pollution) as a consumer benefit and efficiency.

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