

European Commission
Directorate-General for Competition
Antitrust Registry
1049 Bruxelles
Belgium

Stockholm, 24 June 2010

Consultation on Horizontal Agreements, Ref.: HT.1407

The Confederation of Swedish Enterprise endorses the submissions made by BUSINESSSEUROPE and ICC. We would, however, like to emphasize and expand on certain aspects of the Draft Guidelines as follows.

Information exchanges

We feel that the Guidelines take an unjustifiably restrictive view on what constitutes “genuinely public information” (para 82). Even simple gathering and compiling of readily accessible information, e.g. over the Internet, incur *some* cost, however often small. The notion of “costless” should therefore be replaced by an explanation to the effect that costs must not be significant.

On the exchange of aggregated data (para 85): it would be helpful if the Commission could clarify if there is any kind of analysis or other information that would be considered restrictive of competition when accompanying the statistics.

Also, better criteria for assessing whether data are historic or non-historic would be welcome. Examples are unhelpful if they only illustrate the obvious, namely that information is historic when it has become so old that it is of no interest or relevance.

Standardisation

Our main concerns relate to the proposed principles of disclosures.

We agree that there should be good faith disclosure of essential patents by those who engage in the standard setting process, so as to prevent subsequent abusive “hold-ups” (paras 281-282). However, in our view the Guidelines do not sufficiently take into account confidentiality issues, regarding i.a. IPR-related trade secrets, patent applications and ongoing R&D-work.

Furthermore, the proposed method of determining the FRAND rate does not appear to be workable for complex dynamic standards (paras 284-285). It may be feasible to compare the licensing fees ex ante and ex post when the technology is limited in scope and static, and the patent ownership profile is largely known and reasonably stable. For complex dynamic standards, on the other hand, it would not be possible to do in a consistent and reliable manner. Nor would unilateral ex ante disclosures of most restrictive licensing terms work.

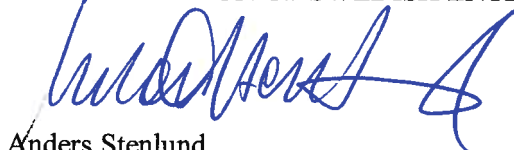
Complex, dynamic standards tend to have a broad technical scope, involving huge numbers of technology contributions and long evolution cycles. There may be thousands of technical documents submitted every year. It is a continuously evolving process where important on-going R&D is carried out in parallel to the standardisation process. The number of essential patents granted to SSO members will typically remain at a relatively low level in the early phases of the cycle. Hence, there will not be a clear picture of the strength of the relevant essential patent portfolios relating to a given standard until a number of years after the first release of the standard. Many of the patents claimed to be essential in relation to a standard may in fact not be essential and the granted claims may be much narrower in scope than the claims applied for – and some claims may not be granted at all.

Thus, in situations where there is genuine uncertainty as just described, the ex ante vs ex post concept cannot be applied. Relying on unilateral ex ante declarations, on each contribution, is equally unworkable, since it is the end-product and its associated essential patents that form the basis.

Against this backdrop, it is of particular concern that the Guidelines seem to take the position that joint discussions of licensing terms (royalty rates included) within an SSO would always be restrictive of competition. However, if the purpose is to establish a cumulative royalty rate that strikes a fair balance between the patent holders, thereby achieving a reasonable return on their R&D and providing low input costs for the competitive downstream industry, such a discussion would also generate pro-competitive effects. The same kind of efficiencies has been recognized for technology pools.

We disagree with the statement that inclusion of substitute technologies in a standard would generally be restrictive of competition (para 288).

CONFEDERATION OF SWEDISH ENTERPRISE



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