

1 July 2010

European Commission  
Directorate General for Competition  
Antitrust Registry  
Ref HT 1407  
1049 Brussels, Belgium

Ladies and Gentlemen:

Public Consultation on draft Guidelines on the  
applicability of art 101 TEU to horizontal co-operation agreements

The DVB Project is pleased to set forth its views on the draft Guidelines on the applicability of art 101 TEU to horizontal co-operation agreements (SEC(2010) 528/2) (the draft Guidelines). At its meeting held today, the DVB's Steering Board directed the Chairman DVB to submit this comment letter describing the present practices of DVB in respect of IPR disclosure and licensing<sup>1</sup> (Today's Steering Board was its first since the public consultation on the draft Guidelines was opened.)

The DVB Project is a standards forum that develops specifications for digital video broadcasting. Formed in 1993, it now has approximately 250 members comprising manufacturers, infrastructure providers, broadcasters and other content providers, and regulators. Originally called "European Project – Digital Video Broadcasting", our membership is now drawn from throughout the world and our standards are implemented in virtually every country. Our specifications are delivered to a recognised body for standardisation, generally the European Telecommunications Standards Institute. The DVB's activities are governed by a Memorandum of Understanding supplemented by Rules & Procedures. (Information on the DVB can be found at [www.dvb.org](http://www.dvb.org))

Shortly after formation, the DVB adopted an IPR policy, now found in article 14 of our Memorandum of Understanding. The basic principles of this policy are:

1. Every DVB member is obligated to grant licences to its IPRs essential to a DVB specification on terms fair, reasonable and non-discriminatory, *unless*

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<sup>1</sup> Those members of the Steering Board that are part of the regulators' constituency abstained from the decision approving this comment letter.

2. that member gives notice, during specified time periods following adoption of the specification and before completion of standardisation, that it cannot grant such licences
3. In addition, DVB members submit themselves to arbitration to resolve disputes over their compliance with the FR&ND obligation and other elements of our IPR policy, *except*
4. if a voluntary jointly administered licensing programme (“patent pool”) is formed covering a critical mass of IPRs essential to a specification.

It is important to note the key elements where DVB’s rules on IPRs differ from those usually adopted by standards bodies: First, DVB rules compel its members to grant licences on FR&ND terms even without disclosure. Instead, there is a system of negative disclosure (paragraph 2 above) but to date no declaration has been submitted giving notice of the unavailability of a member’s IPR. In a further departure from rules typical of standards bodies, DVB actively fosters the formation of patent pools covering its specifications

In fostering patent pools, DVB has developed a set of tools to encourage the speedy selection of a commercial pool facilitator and the launch of the pool in time for market roll-out of goods and services implementing a specification. Today there are commercial pools covering four of DVB’s technologies and four pools in the fostering or formation stage. The established pools provide, among other benefits, certainty to market participants of the aggregate royalty burden of those patents licensed through the pool for implementation of the DVB standard and generally reduced administrative costs for licensing. In addition, ETSI is custodian of three technology access programmes covering DVB standards.

Moreover, DVB has had experience of providing a forum for exchange of views of licensing terms for certain key technologies before final adoption of specifications incorporating those technologies. In this regard, DVB has played a role in the formation of the licensing regime for the Common Scrambling Algorithm (and its successor CSA3). DVB was also active in the establishment of a licensing and compliance regime for the java elements of DVB’s Multimedia Home Platform specification.

DVB has an active IPR Module that reviews IPR issues raised by our governing body, the Steering Board, and the technical subgroups. The IPR Module has recently completed a three-year IPR policy review that resulted, among other things, in a new framework for voluntary disclosure of potentially essential patents, and the formulation of antitrust guidelines.

Overall DVB has demonstrated a willingness to experiment and to create innovative arrangements to ensure that the IPRs essential to the implementation of a DVB specification are available to the market. These innovations include: FR&ND licensing for all DVB members, without the requirement (under our rules) for compulsory disclosure; fostering of patent pools; active oversight of licensing arrangements for key technologies; willingness to

review, fine tune and improve our IPR policy. These have worked well for DVB for over 15 years. We believe that our policy has been generally successful in avoiding misuse of the specification process.

In respect of the draft Guidelines, we would wish to remark on paras 281 and 316. Paragraph 280 announces the objective of the Commission's guidance: "to avoid the misuse of the standardisation process through hold-ups and the charging of abusive royalty rates by IPR holders". The draft Guidelines state that these objectives can be achieved by standards bodies "through rules which are binding on the standard-setting organisations' members". Paragraph 281 then sets out what these rules should be:

[T]he IPR policy [of a standards body] *should require good faith disclosure* of those intellectual property rights that might be essential for the implementation of a standard under development *before that standard is agreed*. This requires that the IPR holders make reasonable efforts to identify existing and pending IPR relating to the potential standard

Paragraph 282 presents the complementary rule of FR&ND commitment.

Paragraph 316 is also worthy of comment by DVB. In the analysis of an example where a standards body has only voluntary disclosure, the draft Guidelines appear to mandate a two-step process of disclosure:

In order not to produce restrictive effects on competition, the parties to a standardisation agreement should ensure that the IPR rules require that [A] companies declare during the standard-setting process (i.e., before the standard is provisionally agreed) that they have (or believe to have) essential IPR (and pending IPR) which may read on a proposed standard, and that [B] these companies identify what essential IPR (and pending IPR) they have (or believe to have) before that standard is formally published.

The analysis however appears to disavow the need for declarants to make a FR&ND commitment (of the sort required by DVB's rules):

Although there is no general requirement that parties to a standardisation agreement must declare that they are willing to licence their relevant IPR on a fair, reasonable and non-discriminatory basis, failure to do so may restrict competition within the meaning of Article 101(1).

(In our view, this analysis in para 316 would appear to give preference to disclosure, eclipsing the FR&ND commitment; this is the reverse of our own "negative disclosure" policy described above.)

We would submit that the single rule required by the draft Guidelines – good faith but mandatory disclosure – does not appear to admit the possibility that other approaches can achieve the Commission's objectives "to avoid misuse of standardisation process through hold-ups and the charging of abusive royalty rates". Other rules adopted by standards bodies

may arguably be equally successful in meeting this objective in the markets they address or among their member companies.

In our view, it is proper that the final Guidelines acknowledge the prevailing disclosure and FR&ND model as a tool to reduce misconduct within standards bodies. (Indeed in some circumstances it may be the superior model.) At the same time, the final Guidelines should also recognise, perhaps explicitly, the other approaches that have been successful in achieving the objectives of competition and IPR law while promoting the broad, low-cost dissemination of new technologies used by European consumers.

My colleagues of the DVB Project and I would be pleased further to discuss with the Commission

Sincerely,



Phil Laven  
Chairman DVB

cc: Members, DVB Steering Board; Legal Director DVB, [eltzroth@dvb.org](mailto:eltzroth@dvb.org)