

Contribution of the FFII e.V.

The drafted Guidelines as they are presented in Chapter 7 require thoughtful economical review. They comprise very provocative asserts which challenge the very foundations of competition policy, and with regards to IPR licensing in standardisation mistake the "factual" for the "normative" and stifle private pro-competition agreements.

The term "standard" throughout the Chapter 7 is not applied in accordance with the applicable European legal definition and comprises specifications, consortia documents and business agreements. Item 253 indicates a mismatch with the applicable 98/34/EC definitions. The wording "standard" therefore should be adjusted.

Standards in terms of 98/34/EC are delegation of public authority, as voluntary, market driven co-regulation they provide an alternative to actual public regulation, and have to be traded-off in a public policy context: the public authority refrains from regulation but still reserves that stick. These standards are particularly relevant to public procurement as stakeholder driven co-regulation. Such de jure standards and consortial agreements as well offer a potential of "vendor capture" with regard to public sector clients and markets in general. A concern that a "service market for standard-setting may be affected if different standard setting bodies or agreements exist." (item 256) is only founded when the alternative standard attempts to lower competition.

The rule (item 278) "The standard-setting organisations should also have objective and non-discriminatory procedures for allocating voting" demonstrates the deficits of a stakeholder driven approach in terms of 'discrimination' and 'representativeness'. Recent data from NormaPME shows that practising SMEs are severely under-represented in European standardization bodies. It is questionable if Commission- or government-funded special interest organisations for Consumers or SMEs may compensate for a manifestation of less empirical involvement of end users and practising SME.

"Open standards" (and specifications) - where patents are made available under royalty-free terms - inherently promote a free markets and maximize market access and consumer choice. A perfect standard is a perfectly commoditised one. Also "open standards (and specifications)" are usually "unlicensed": in addition to royalty-free access they inflict no further contraction costs on standard implementers and users.

Licensed agreements and FRAND arrangements in particular are a second best solution. A wise antitrust policy would refrain to make it the scope of antitrust intervention to favor second best over first best arrangements and defame "perfect competition" with unsound "innovation" policy arguments. It appears rather grotesque to make open standards (characterized by RF terms for necessary patents or absence of patent coverage) appear like a buyer's cartel (if that is existent) and restrict the contractual freedom to set such participation requirements as an application of Article 101.

The principle (item 267) "Prior to the adoption of the standard, agreements by IPR holders on the licensing terms they will disclose will also constitute restrictions of competition by object within the meaning of Article 101(1)." should not apply to royalty-free terms and conditions as under these conditions no restriction of competition factually unfolds.

Any analysis has to be soundly derived from a rationale of a market system. It is unacceptable to ban RF licensing conditions and express a bias towards second best FRAND conditions (item 278). Unlike the item presumes a holder of essential IPR is not

the same as a contributor to standard development.

"There should be no bias in favour or against royalty free standards, depending on the relative benefits of the latter compared to other alternatives." (item 278)

This very statement is **outrageous** under a competition perspective! The very purpose of antitrust rules including Article 101 is to promote "the relative benefits of the latter compared to other alternatives", namely achieve an allocation with more competition and better access to market. Private arrangements which enable market allocations with more competition further the objectives underlying Article 101 by free association. From Article 101 you cannot derive an objective to fight better competition as achieved by unlicensed RF terms.

While royalty-free rules currently cannot be enforced against non-participants in standards development, except where the special situation may require a legal mandate unlicensed access, e.g. for e-government applications. In such cases fixed compensation schemes for IPR holders appear to be the appropriate licensing method to keep standard use royalty-free. Also an option of RF agreements to defend the respective patents against non-participants in the standard agreement should be available.

The rule of item 277 binds an observable criteria "restriction of competition" to certain licensing conditions which are not always sufficient and acceptable, independent from the relative market conditions. Notably, under certain circumstances FRAND licensing could still discriminate common business models such as open source software or be unacceptable for public policy reasons. General clause phrases derived from competition case law do not necessarily provide what these loaded terms promise: open source users do get discriminated under FRAND terms ("uniform fee") which may be quite unreasonable in certain markets, and unfair. Users which do not pay a patent toll to a patent holder get discriminated, they may not use the standard. Standards encumbered by FRAND terms still limit competition in comparison to a first best royalty-free market allocation. As we find no "free lunch" in patents, the commercial value of a patent is always derived from its potential to restrain competition.



The Foundation for a Free Information Infrastructure (FFII) e. V. is a charitable association registered in Munich, Germany, which is dedicated to the spread of data processing literacy and consumer protection. It funds the development of public information works based on copyright, free competition and open standards. The FFII attained broad international recognition for its phronetistry role in the European debate on a software patent directive (2002-2005) and software-related patent reform.

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