

HAMMONDS LLP

Comments in response to the public consultation

regarding the revised rules

for the assessment of horizontal cooperation agreements

under EC competition law

24 June 2010

1 INTRODUCTION

Hammonds LLP welcomes the opportunity to submit its observations regarding the ongoing European Commission (**the “Commission”**) public consultation¹ of its new draft horizontal guidance notes, (**the “Draft Guidelines”**).² These will replace the current guidance notes regarding horizontal cooperation agreements (**the “Horizontal Guidelines”**).³

We find the Horizontal Guidelines a very useful guiding and working tool for the assessment of horizontal cooperation agreements. Both the Horizontal Guidelines and the Draft Guidelines are informative regarding standard setting related issues, in particular in the context of standard setting activities of standard bodies.

We would limit, therefore, our comments on the Draft Guidelines to a specific issue that we believe merits further clarification and guidance by the Commission. In this regard, we point to the issue of standards and standardisation agreements, namely section 7 of the Draft Guidelines.

2 STANDARDS AND EC COMPETITION LAW

Standard setting and its implementation often raises complex legal issues. Overall standards *per se* may be pro-competitive. It is, however, common ground that standards may constitute a vehicle for anti-competitive actions in various forms. These include, *inter alia*, potential restrictions of price competition and/or limitations

¹ http://ec.europa.eu/competition/consultations/2010_horizontals/index.html

² Draft Communication - Guidelines on the applicability of Article 101 of the treaty on the Functioning of the European Union to horizontal co-operation agreements.

³ Commission Notice- Guidelines on the applicability of Article 101 TFEU (ex Article 81 EC) to horizontal cooperation agreements, OJ C 003, 06.01.2001.

and control of production, markets, technical development and innovation, facilitation of a collusive outcome on the market, negative foreclosure effects and abusive control of the use of the standards and the products and/or services to which the standards relate.⁴

Standard setting is an activity that is away from the market. The closer it gets, by interlinking standard setting activities with the commercialisation of the standards, the greater the likelihood that anti-competitive distortions may emerge.

Indeed, on the one hand, standard setting, by jointly combining knowledge and technical knowledge may contribute to efficient development of standard solutions. Horizontal cooperation in standard setting should, in appropriate cases, be encouraged, i.e. where it is an efficient means to promote technological development, drawing from a widest possible pool of knowledge and technical expertise. This is the rationale for, in principle, allowing such forms of cooperation among competitors, subject to certain safeguards.

On the other hand, jointly launching and commercializing the developed standards on the market by the same players, who are active in standard setting arrangements poses competition concerns.

Accordingly, this is the reason why Recital 173 of the Horizontal Guidelines provides that ***“as a general rule, there should be a clear distinction between the setting of a standard and, where necessary, the related R & D, and the commercial exploitation of that standard. Agreements on standards should cover no more than what is necessary to ensure their aims, whether this is technical compatibility or a***

⁴ See for example recitals 258 et seq of the Draft Guidelines.

certain level of quality. For instance it should be very clearly demonstrated why it is indispensable to the emergence of the economic benefits that an agreement to disseminate a standard in an industry where only one competitor offers an alternative should oblige the parties to the agreement to boycott the alternative” (Emphasis added).

This recital is to be replaced by recital 308 of the Draft Guidelines, according to which: *“As a general rule standardisation agreements should cover no more than what is necessary to ensure their aims, whether this is technical compatibility or a certain level of quality”*.

However, we respectfully submit that the wording of the original recital 173 should be maintained in the Draft Guidelines and further clarified.

As a general rule, standard setting should be disassociated from commercialization. Standard setting and standardisation agreements should cover no more than what is necessary to ensure their pro-competitive aims of technical compatibility and/or certain level for quality and efficiencies. When, on the other hand, cooperation exceeds these pure standard setting activities and affects market behaviour related to the so developed standards, the combination of the two activities becomes questionable. In particular, the criteria of Article 101 (3) TFEU, such as the indispensability criterion, are unlikely to be fulfilled.

The Draft Guidelines refer to a specific example, namely that *“standardisation agreements that entrust certain bodies with the exclusive right to test compliance with the standard, or that 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.”⁵

Equally important and for similar underlying concerns, a clear distinction and separation of the provision of direct promotional/customer and business related services from the standard setting procedure should be maintained. To the extent that standards are not merely jointly developed and set, but also jointly commercially exploited by the same undertakings, they may produce anti-competitive effects. In addition, they are increasingly likely to enhance the abusive exercise of control of the use of standards and the products and or services to which the standards relate.

Therefore, a clear distinction between standard setting and commercialization reflects that standard setting activities do not go beyond what is necessary for the achievement of their efficiencies in terms only of technical compatibility and/or certain level for quality and efficiencies.

An agreement to jointly set standards, which may, as a result, become the dominant and/or de facto industry standards, should be clearly distinguished from the joint commercialization of the standard. By bundling standard setting and commercialization, dominant undertakings may also be putting pressure on market players not to market products and/or services that do not comply with the standard, which in itself is restrictive, by object, of competition. In addition, in the absence of a clear distinction between the purely standard setting and commercial activities and without appropriate safeguards in place between the two, the standard heavily risks

⁵ Recital 305 of the Draft Guidelines.

becoming de facto mandatory in a given industry.⁶ Compliance, however, with standards should be voluntary. Such agreements are therefore in principle not indispensable.⁷

To sum up, the existing Horizontal Guidelines in recital 173 make a clear and unambiguous point regarding the relationship between standard setting and commercialization and should be retained.

⁶ See also recital 266 of the Draft Guidelines that provides as an object restriction the case where “*an agreement by a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard.*”. See also recital 277 of the Draft Guidelines, “...no obligation to comply with the standard...”.
⁷ Recital 309 of the Draft Guidelines.