



Japan Business Council in Europe (JBCE)
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EU COMMISSION PROPOSAL FOR HORIZONTAL GUIDELINES

COMMENTS BY JBCE

Introduction

Japan Business Council in Europe (JBCE) would like to express its appreciation for the European Commission's efforts in providing further clarification on the application of competition law to certain aspects of Horizontal Cooperation.

Chapter 7 of the draft Horizontal Guidelines dealing with standardisation agreements is particularly important for our members, most of whom are technology-rich companies. Therefore, we have focused our observations on that part of the proposal.

We believe that the effectiveness of the Guidelines could benefit from the following remarks:

1. Ex-ante disclosure of relevant IPR

We suggest that the Guidelines are more specific on what the obligation to disclose patent applications means for patent applications that have not been published and are therefore still confidential. Such applications should be protected like know-how or other trade secrets.

2. FRAND Commitment

JBCE welcomes the requirement that SSO should request members for an irrevocable FRAND commitment. In this connection we interpret "irrevocable" to mean that a member is bound by the commitment also after it resigns from the SSO or the standardisation process. The Commission may wish to consider expressing this more explicitly in the Guidelines.

A frequent practice of some SSO is to work on the basis of royalty free licenses as opposed to a FRAND license. To avoid confusion it should be considered to stipulate explicitly that the concept of FRAND encompasses royalty free terms. As a result, any obligations connected with FRAND should also be extended to situations where royalty free licenses are agreed. This is particularly relevant in the event of a transfer of patent portfolio.

3. Pool Licensing

Early discussions on the creation of patent pools and pool licenses risk being labelled as potentially anti-competitive. However, patent pools mostly have pro-competitive effects: A pool often determines a reasonable royalty rate that is subsequently allocated between members. Thus pool licensing avoids royalty stacking or other abusive royalty pricing.

Within the pool it is virtually excluded that an individual licensor could claim abusive license conditions. Pool licensing is therefore more likely to lead to FRAND licenses than individual commitments by single licensors. The Guidelines should perhaps acknowledge this.

4. Additional methods for assessing FRAND

The draft Guidelines propose a very limited set of valuation tools in the context of making a FRAND assessment. The following useful and user-friendly tools merit inclusion into the list:

- The cumulative royalties for all (or most) of the essential IPR on the standard;
- The most similar, competent pool license terms for similar products or services;
- The license conditions of pool license schemes which consist of key members of the standard.

5. Ex-ante Disclosure of License Terms

JBCE has serious doubts on the mandatory nature of the ex-ante disclosure of the most restrictive license terms.

Pool licensing generally is a good remedy and beneficial to the consumer. The earlier discussions on pool arrangements can start, the earlier potential licensees can come to the market and the more pro-competitive effects consumers would enjoy. The Guidelines should therefore explicitly state that early discussions on pool formation, even before a standard has been set, are likely to be beneficial, provided that certain conditions are met. The DoJ and JFTC have also recognized this.

6. Exploitative Non-monetary License Terms

JBCE would like to invite the Commission to consider addressing in the Guidelines the issue of the Exploitative Non-Monetary License Terms. Exploitative Non-Monetary License Terms are observed as a form of misuse by IPR holders who attained a dominant position as a result of such IPR being included in a standard. They include, in particular, a) a royalty free grant-back (i.e. a

licensor requiring a licensee to grant to the licensor a royalty free license under the latter's IPR) and b) non-assertion provisions ("NAP" i.e. a licensee's covenant not to assert its IPR against other licensees or customers of the licensor). While the grant-back or NAP are not unusual in licensing practices, they have serious anti-competitive effects once the scope are unfairly determined by the licensor taking advantage of the dominant position. Such exploitative license terms effectively diminish the value of the licensee's IPR and, thereby impairing the motivation of licensee to further invest in R&D. As a result, the licensor's dominant position in the market will be unjustly reinforced. The Japanese Fair Trade Commission has accused a licensor in a recent case on this ground.^[1] Given that such anti-competitive concerns can be triggered as a result of standardisation, it is desired that the Guidelines set forth clear rules that would preclude these Exploitative License Terms as well as other potential misuse by way of charging unduly excessive royalties.

Conclusion

JBCE welcomes the Commission's draft Horizontal Guidelines and the clarification provided on standards but urges the Commission to take on board the suggestions formulated above that are rooted in the day-to-day experience of JBCE member companies that are deeply involved with standardisation activities on an ongoing basis.

JBCE holds itself available to the Commission to provide additional clarification on the points raised or to answer any other questions.

About JBCE

The Japan Business Council in Europe (JBCE) is a Brussels-based organisation representing companies of Japanese parentage operating in Europe. The mission of JBCE is to contribute to European Public Policy. JBCE membership currently consists of more than 60 multinational companies and covers a wide range of industry sectors, including air-conditioning, automotive parts, chemicals, consumer electronics, engineering, industrial machinery, information and communication technology, medical equipment, photo and imaging equipment. One of the major roles of JBCE is to represent the views of its members on legislative issues currently under debate and on the public policies issues which will shape the years to come.

^[1] <http://www.jftc.go.jp/e-page/pressreleases/2009/September/090930.pdf>