

Comments of

Koninklijke Philips Electronics N.V.
Intellectual Property & Standards
High Tech Campus 44
5656 AE Eindhoven
The Netherlands
EU Register of interest representatives registration number 02341041540-74

to

- the draft Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements, and
- the draft Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.

Philips welcomes the opportunity to provide meaningful input to the draft Regulation and Guidelines. Philips participates and has participated as an active member in multiple standard-setting organizations and R&D projects, aimed at a variety of industry or consumer standards/products. As an important industry player with an annual R&D spend in excess of 2 billion Euros, Philips believes that the draft Regulation and Guidelines should provide a legal environment that is favorably disposed to innovation and R&D in Europe and provide the necessary legal certainty to industry partners engaged in R&D projects. At the same time, the Regulation and Guidelines should not impose a rigid framework, but allow for flexibility and recognize legitimate industry practice in the field of R&D co-operation.

Having said this, Philips would like to make some observations and express concern that some elements and provisions of the draft Regulation and Guidelines do not meet the above.

1. Ex ante disclosure of patents

Article 3 (2) of the draft Regulation provides that:

“The parties must agree that prior to starting the research and development all the parties will disclose all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by the other parties.”

Paragraph 281 of the draft Guidelines contains a requirement to the same effect.

This provision is not included in the R&D Regulation currently in force. Philips respectfully submits that this new requirement is unnecessarily rigid and cumbersome. While the requirement may have been inspired by what is – mistakenly - believed to be desirable for standardization, it is noted that the draft Regulation also covers all R&D cooperation that has nothing to do with standardization. Clearly, imposing rules



that do not even have utility in the framework of standardization, to non standardization related R&D activities as well, would be a clear example of overkill.

Even for standardization the proposed rule is not suited: before the start of the standardization activity, how can a company identify its existing and pending intellectual property rights that are relevant for the commercial use of the results of the standardization effort? This is impossible because these results are not yet known. Apart from that, even if this were possible, it would be an unreasonable burden for companies having large intellectual property portfolios. It is not acceptable that they would have to search their total portfolios to identify any relevant intellectual property rights.

In view thereof, most standard-setting organizations have so far not adopted any such rule. Indeed, to the extent that standard-setting organizations have any rules on patent disclosure, these rules differ considerably. By way of example, a rule that would require individual representatives of companies who participate in the technical standard-setting process within a standard-setting organization to disclose their company intellectual property rights of which they have personal knowledge and which is directly relevant to a particular technical contribution made by that representative, seems entirely reasonable. Conversely, to require the company or organization to disclose all their existing and pending intellectual property rights may be too burdensome.

Philips wishes to point out that in most standard-setting projects, a strict requirement as per Article 3(2) of the draft Regulation is not necessary, provided that the participants to the standard-setting project are bound by obligations to make intellectual property rights that are essential for the exploitation of the standard available on reasonable and non-discriminatory (RAND) conditions. This is indeed what participants in most standard-setting projects commit to, at the start of the R&D or standardization project, on the basis of reciprocity. The commitment to make intellectual property rights available on RAND terms provides the more important comfort to participants at the start of the R&D project.

Philips feels that the rules on patent disclosures should be left to the Standard-Setting Organizations themselves, and that a strict requirement or even fallback position to the effect that all existing and pending intellectual property rights must be disclosed at the start of the standard-setting process is undesirable and may be even counterproductive.

To require a full disclosure of pre-existing intellectual property rights prior to starting R&D cooperation would impose an undue burden on participants, in most settings, depending on the technologies, markets and participants involved. Whilst a general disclosure requirement as to the existence of intellectual property rights in a general area, relevant to the R&D project may be possible, in this connection, one should bear in mind that the relevance of specific intellectual property rights may only become clear during, or indeed towards the end of the R&D project, when the final specifications are adopted or close to adoption. Therefore, a disclosure of all existing and pending intellectual property rights at the start of the standardization or R&D project will not even be possible.

Paragraph 287 of the draft Guidelines addresses the issue of ex-ante disclosure of licensing terms. In general terms, Philips takes the view that standard-setting organizations should principally be concerned with making technical choices, based on objective choices such as technical superiority or interoperability, that bring consumer benefits. As the Commission rightly notes, standard-setting organizations should not occupy themselves with pricing arrangements or (collective) negotiations about royalty rates for their intellectual property rights relevant to the standard. In practice, a requirement to disclose most restrictive licensing terms within the context of a standard-setting organization may well evolve into such discussions, which would indeed be undesirable and might lead to restrictions of competition within the meaning of Article 101(1) of the Treaty on the Functioning of the European Union. We believe that an ex-ante disclosure of licensing terms can only create a quasi-transparency, because it is not clear to what products these terms apply, and it does not give any guarantee that the cumulative royalty will still be reasonable. We, therefore, promote patent pools, as the best possible safeguard that the total royalty for use of the standard is reasonable and non-discriminatory.

2. Equal access to results

Article 3 (3) of the draft Regulation provides that:

“The research and development agreement must stipulate that all the parties must have equal access to the results of the joint research and development for the purposes of further research or exploitation.”

While such “equal” access makes sense when the R&D partners are direct competitors, it will not be logical when the R&D partners are active in different or complimentary product markets. In the latter event, there would be good commercial logic why the access to the results for exploitation purposes may be differentiated. By means way of example, if a coffee supplier and a manufacturer of coffee machines cooperate in R&D, then the coffee supplier would normally not be interested in R&D results relating to the coffee machines, whereas the manufacturer of coffee machines would not be interested in R&D results relating to coffee packaging.

When “equal access” would be interpreted as also encompassing so-called have-made rights, in this example, the coffee supplier may allow a competitor of the manufacturer of coffee machines to market coffee machines using the R&D results, including any necessary so-called background IPR through sales channels managed by the coffee supplier, and vice-versa. This latter result would be undesirable. Philips therefore submits that the new Regulation should recognize that different participants in R&D cooperation may have different characteristics and that there is a need to relax the requirement of “equal access” to take account of these differences. Put differently, the safe harbor provided by the new Regulation should also be available to R&D projects where the various participants are not actual or potential competitors but are active in different product markets and where their access to the results of the R&D is tailored accordingly.