

Pinsent Masons

BY POST

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23 June 2010

Dear Sirs

We wish to make the following comments in respect of the draft Communication from the Commission on the draft Guidelines on horizontal cooperation agreements, SEC (2010) 528/2.

We welcome the inclusion within the draft Guidelines of a chapter dealing with the issue of standardisation. We note from the Commission's press release (MEMO/10/163 of 4 May 2010) that the "*purpose of the standardisation chapter is to give guidance on how to ensure that the selection process is competitive and that, once the standard is adopted, access is given on 'fair, reasonable and non-discriminatory' (FRAND) terms to interested users*". Given the growing importance of (and debate over) FRAND principles in IPR licensing, we would suggest that there should be a more extensive discussion of the issue within the final version of the Guidelines.

For example, we would suggest that it is important, and most likely to result in efficiencies being passed-on to consumers, if there is up-front transparency about the precise mechanism by which licensing of the IPR is to occur, and also clarity and flexibility about where in the supply chain royalty fees may be paid to IPR holders. Without such up-front transparency there is a risk that confusion may arise, which could lead to a sub-optimal approach being adopted to the production, supply or licensing of products covered by a standardisation agreement which may in turn deprive businesses in the supply chain and, ultimately, end-consumers, of the potential benefits arising from standardisation agreements.

The risks of confusion arising were acknowledged, for example, in the European Competition Report of 2003 (pages 197-200) where the Commission commented adversely on the administration of a patent pool being operated on the basis that it "*lacked transparency and created confusion among licensees*". In this context we wish to make the following specific observations in relation to Chapter 7 of the draft Guidelines, which deals with standardisation agreements.

First, in the context of a standardisation agreement, it should be even more clearly stated that the FRAND principle requires the IPR holders to grant technology licences to any entity willing to enter into a standard form licence.

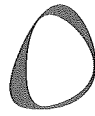
Secondly, it should be clarified in the final Guidance that the approach adopted by the IPR holders towards the licensing to third parties of the relevant technology should be consistent and transparent. Further, the final Guidelines could helpfully provide that the management of

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the IPR should not be done in such a way as to lead to confusion and uncertainty on the part of companies in the supply chain, and especially willing licensees.

Thirdly, the terms of any licence of the IPR should be identifiable up-front, as should be the amount of any royalties payable for the relevant IPR, and it should be clear up-front as to whether licences may be (or must be) entered into at particular points (or at any level) in the supply chain.

Finally, it would be helpful if the final Guidelines were to address the considerations to be taken into account, in a FRAND context, when considering whether a licence fee is excessive where it is charged as a flat rate per product sold, and yet technological developments mean that the resale price declines in real times very significantly (and therefore the royalty fee increases greatly as a percentage of the resale price) over a short period of time.

We hope that you find these comments helpful.

Yours faithfully

Pinsent Masons LLP