

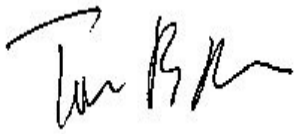
**JUNE 25, 2010**

European Commission  
Directorate-General for Competition  
Antitrust Registry  
Ref.: HT.1407  
1049 Bruxelles/Brussel  
BELGIQUE/BELGIË

Dear Sir or Madam,

On behalf of Red Hat, Inc, I am very pleased to submit our response to the European Commission's public consultation on revised rules for the assessment of horizontal cooperation agreements under EU competition law. Red Hat is the world's leading open source solutions provider and has over 60 offices around the world, including several facilities in Member States of the European Union. As a technology service provider, we have an extensive interest in supporting policies that allow all vendors to compete on a level playing field and that promote interoperability. We are very pleased with the Commission's leadership in standards policy and the opportunity to answer selected questions from the consultation document. I invite you to contact us should you require further information.

Sincerely,



Tom B. Rabon  
Executive Vice President  
Corporate Affairs



**RED HAT RESPONSE TO:  
PUBLIC CONSULTATION ON REVISED RULES  
FOR THE ASSESSMENT OF HORIZONTAL  
COOPERATION AGREEMENTS UNDER EU  
COMPETITION LAW**



## INTRODUCTION

Red Hat welcomes the European Commission's open approach to public consultation. We agree with the Commission's sentiment that

Greater prosperity results from innovation and from using resources better, with knowledge as the key input. To make this transformation happen, Europe needs to use a number of tools, including competition to drive companies to innovate and co-operate in efficiency enhancing projects. Competition enforcement can only be effective if its policy instruments and in particular those impacting on horizontal co-operation agreements are kept up to date and brought in line with market developments.

In our opinion, this statement demonstrates the Commission's appreciation of both market forces and public agencies' role in ensuring a level playing field for all companies to compete.

A key issue addressed in the revised rules is standard-setting arrangements. The Commission rightfully acknowledges that standards are becoming increasingly important in facilitating innovation, especially in the information technology sector. We appreciate the Commission's thoughtful address of this topic and wish to offer a few comments to Section 7: Standardisation Agreements.

### **7.3 Assessment under Article 101(1)**

As noted in 7.3.1(258):

Standardisation agreements generally have a positive economic effect, for example by promoting economic interpenetration on the internal market and encouraging the development of new markets and improved supply conditions. Standards may increase competition and lower output and sales costs, benefiting economies



as a whole. Standards may maintain and enhance quality, provide information and ensure interoperability (thus increasing value for consumers).

Red Hat is very pleased to see the Commission's recognition of the importance of standards and the positive impact standards have both for industry and for consumers.

In 7.3.3(260-262), the document accurately states that the selection of detailed technical specifications for a product may prove to be a barrier for competing technologies that could potentially be excluded from the market if one company holds essential intellectual property (IP) necessary to implement the standard. The Commission acknowledges that the IP-holder could abuse its dominant position by extracting "excess rents" from other companies who wish to implement the standard. Given this accurate assessment of one of the largest issues facing the standards world today, Red Hat is puzzled by the Commission's subsequent treatment of intellectual property licensing in its rules regarding standard-setting agreements.

In 7.3.3(269), the Commission states:

Whether standardisation agreements may give rise to restrictive effects on competition depends, among other factors, on the extent to which the members remain free to develop alternative standards or products that do not comply with the agreed standard.

Red Hat does not agree with the implicit suggestion here that standardisation agreements could restrict competition unless there is support for alternative standards. It is, to be sure, possible for standards to restrict competition when a company holds the intellectual property rights to technology necessary for implementation of the standard and imposes licensing fees or other restrictions on the use of that IP. But there is no such risk of harm to competition when the standard is truly open. An open standard is developed through a transparent process by a broad group of stakeholders, available free from any licensing restrictions, royalty payments, or other restrictions, and is implementable by



multiple vendors on multiple platforms. Support for open standards is also support for fair and vigorous competition. In the software industry, for example, standards provide baseline specifications for vendors, which then encourages competition to provide the best implementation of the standard and the best service and support.

In addition, Red Hat believes that multiple, or alternative standards should not be encouraged. In the IT sector, for example, establishing multiple competing standards for the same applications serves no purpose in the marketplace and limits users in the exchange and ownership of their data. Rather than increasing choice, the consumer gets locked in to one vendor's products.

Moreover, we believe it is in the public's interest for the Commission and other public agencies, in their public procurement, to strongly discourage alternative standards for software, in particular enterprise/organizational software solutions. Competition, choice, and efficient expenditure of public funds are all promoted through adoption of a clear and unambiguous definition of and preference for open standards in information technology public procurement across the European Union to which all IT vendors should adhere.

## LICENSING

Red Hat thinks that the Commission's exclusion of royalty-free standards from subsection 277 should be reconsidered. This section states that "...standardisation agreements which set no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms do not restrict competition within the meaning of Article 101(1). " In Red Hat's view, FRAND, which allows rightsholders to charge royalties, still discourages competition by driving up costs for implementers and thus creating barriers for new entrants to the market. This is particularly true when the standard contains multiple patented technologies and royalty-stacking occurs. In such cases, small companies cannot afford to compete, and there are fewer products available to consumers.



Standardisation agreements that provide access on a royalty-free basis, on the other hand, do not restrict competition among implementers of the standard. Multiple vendors can implement the standard, increasing competition and benefitting consumers. Red Hat believes that the Commission should replace FRAND standards with royalty-free standards in subsection 277. Barring that, Red Hat believes that, at the very least, royalty-free standards should be recognised as an available alternative to FRAND standards.

Red Hat is strongly opposed to the following statement in subsection 278:

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

There can be no reason why the Commission should not encourage royalty-free standards, particularly in the information technology sector. The Commission should not bar royalty-free policies in standard setting organizations. They are presumptively pro-competitive, for the reasons explained above: expansion of the market; promotion of competition and choice in the creation of products that implement the standard; and minimal risk of limiting innovation in nonstandardised products, given the nature of the sector and the software development process.

## **CONCLUSION**

Red Hat understands that the Commission seeks fair competition among many different companies with a variety of business models. Thus, finding balance in guidelines for horizontal cooperation agreements is a daunting task. Red Hat applauds the Commission for its thoughtful approach to many difficult issues.

Further, we have been pleased to see public consultations on the standardisation process in many documents over the past year, including the Modernising ICT Standardisation whitepaper, the Draft EIF 2.0, the consultation on European Standardisation Systems, and others. It is obvious that public agencies in the EU



understand the importance that standards play in encouraging innovation and competition. However, given the number of initiatives surrounding standards by different agencies in recent months, we believe it is imperative that the Commission adopt a clear and uniform definition of open standards across the European Union.

Red Hat believes that such a definition should prohibit the charging of royalties for implementation of a standard, particularly in the information technology sector, as this inhibits competition and impedes innovation. Ultimately, it is the consumer who loses, paying a higher cost than necessary for technology and often becoming locked in to one vendor's product. As a policymaking institution, with its primary concern being citizens across Europe, we believe the European Commission should lay the groundwork for promoting true interoperability, ensuring better value and choices for its citizens and facilitating competition in European and international markets.