

TO THE COMMISSION OF THE EUROPEAN UNION
DIRECTORATE-GENERAL COMPETITION

COMMENTS

submitted by



Research In Motion

concerning Section 7 of the Draft Guidelines
on the Applicability of Article 101 of the Treaty on the Functioning
of the European Union to Horizontal Co-Operation Agreements

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Introduction

1. Research In Motion (RIM) welcomes the opportunity to comment on the Commission's draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal co-operation agreements (the Draft Horizontal Guidelines)¹ and would like to address Chapter 7 of the Draft Horizontal Guidelines relating to standardisation.
2. RIM, together with a number of other companies, has submitted a joint submission addressing Sections 7.3 and 7.4 of the Draft Horizontal Guidelines (the Joint Submission). The present comments are individual comments by RIM and are made in addition to the Joint Submission.
3. RIM is a manufacturer of innovative wireless solutions for the global mobile communications industry. It was founded in Ontario, Canada in 1984. In the mid-1990s, RIM focused its efforts on the advancement of paging technology. RIM pushed the existing technology forward beyond paging by integrating wireless email into these devices. RIM entered the mobile device market in 2001 with the introduction of its popular "BlackBerry®" device that have since revolutionised the market for business and personal communication. RIM's technology also allows a broad array of third party developers and manufacturers to enhance their products and services with wireless connectivity to third party data.

¹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, SEC(2010) 528/2, Brussels, 4 May 2010.

4. As a global company RIM currently employs over 15,000 people throughout the world, 10% of which are employed in Europe. In 2009, RIM has sold over 1.8 billion Euros of products and services in Europe.²
5. Since its market entry, RIM has been deeply involved in the evolution and development of standards through its membership of standard-setting organisations (“SSOs”) in Europe, the United States, and Asia. Throughout the evolution of various standards, RIM has been a contributor of proprietary technology. As a manufacturer of mobile communication devices, RIM also implements a wide range of standards in its products.
6. First and foremost, RIM wishes to express its support for the Commission’s lasting commitment to regulating standard-setting organisations in Europe, ensuring SSOs having clear and effective rules. Standards play a vital role in today’s modern knowledge economy and RIM believes that active and continual regulatory oversight of the standard-setting process is required to ensure a competitive marketplace, continued innovation and resulting benefits for European consumers.
7. Recent cases have shown that standard-setting processes are susceptible to abuse and that constant regulatory vigilance is required to ensure that licensors of essential IPR cannot stifle innovation (whether in relation to standard-setting itself or in relation to the manufacturing of a product implementing a standard). There is concern that the behaviour of such players will lead to the foreclosure of technology competition and of manufacturing innovation, to the detriment of European consumers.
8. To counter-act such behaviour, the Commission has taken a step in the right direction with the Draft Horizontal Guidelines setting out a number of simple rules for standard-setting organisations and aiming to close existing loopholes of SSOs IPR Policies. RIM however believes that even clearer guidance, particularly in relation to FRAND would be desirable and would provide more certainty in this area.³
9. Prior to providing specific comments on the Draft Horizontal Guidelines, we would like to briefly outline RIM’s general understanding of the role of standardisation in competition policy, and to explain how in RIM’s view

² Calculation includes Turkey and is based on the financial year that ends of February 27, 2009.

³ RIM’s support to clear and effective SSOs IPR Policies, particularly in relation to FRAND, should not be understood as an admission that such rules will be practical or effective in all circumstances and will obviate the need for later intervention through regulatory investigations. It is rather RIM’s belief that a rule of law is only as good as its enforcement.

standards are uniquely linked to innovation in Europe and the objectives of Europe 2020 (Section 1). In Section 2 we will then submit specific comments with regard to the need for increased transparency of essential IPR. Section 3 addresses greater transparency of licensing terms. Section 4 deals with FRAND and the availability of injunctive relief. Finally, Section 5 describes the importance of a reliable FRAND commitment.

Section 1: Standardisation, EU Competition Policy And Europe 2020

10. Standardisation is central to innovation and the objectives of Europe 2020. Indeed, as one prominent Commission official has observed, “*standardisation is not only a technical tool; it is becoming a political instrument of the EU economic and industrial policy.*”⁴ Manufacturing and technical innovation are at the core of EU economic and industry policy and RIM believes that standardisation must be oriented towards the development and expansion of Europe’s manufacturing and industrial base. Provided that certain criteria are satisfied, standardisation will play a pivotal role in the fulfilment of Europe 2020.
11. On a daily basis, we see evidence that the world is becoming more interconnected and that global industry is becoming more integrated. Given the increased integration of global economies, technologies and products, certain specifications common to all stakeholders are required. Standardisation is the process through which these specifications are incorporated into one single standard. Standards are present in most network industries and help to eliminate network inefficiencies in manufacturing markets. Consistent with the objectives of Europe 2020, the primary objective of standardisation must be the facilitation of manufacturing efficiencies derived from interoperability and the roll-out of new and innovative technologies.
12. In conjunction with the objectives of Europe 2020, Article 101(3) TFEU in turn has the key requirement that consumers receive a share of the resulting benefit of any standardisation agreement. Consumers will only receive a benefit if the standard facilitates greater manufacturing efficiencies through beneficial network effects and related efficiencies.

⁴ Michel Ayrat, Director Directorate-General Enterprise and Industry European Commission, "International Cooperation in Standardisation – an indispensable tool in the Global Economy," World Standards Day 2005 Conference: 'International Cooperation in Standardisation' Conference organised by the Enterprise and Industry Directorate-General, 14 October 2005, Brussels, Belgium.

13. This means that in the context of standardisation, the objectives of Europe 2020 and Article 101(3) TFEU are aligned; both require the facilitation of innovation and manufacturing efficiencies that directly benefit consumers.
14. In RIM's view it is therefore essential when analysing the competition law consequences of standardisation to recognise the goal sought through standard-setting in general and the underlying reasoning for the Article 101(3) TFEU exemption that allows for the exclusion of otherwise competing technologies. Standardisation is intended to facilitate the creation or growth of a downstream market with concurrent benefits to consumers. In RIM's view it would thus be contrary to EU law and EU competition policy to allow the creation of a standard that unjustly enriches IPR holders and inhibits innovation, market entry and productivity in the downstream manufacturing sector, all of which is at the expense of the consumer benefits that would otherwise arise.

Section 2: Increased Transparency About Essential IPR

15. Against that backdrop, RIM warmly welcomes that the Draft Horizontal Guidelines provides for a requirement of good faith disclosure of essential IPR, including granted patents as well as patent applications (Paragraph 281 of the Draft Horizontal Guidelines). As previously highlighted by the Commission in its Communication "Intellectual Property Rights and standardisation"⁵, as well as in several letters in connection with the Commission's previous ETSI investigation⁶, the disclosure of essential IPR is of importance to the standard-setting process. Without the identification of essential IPR, participants cannot make informed decisions when selecting technologies for standardisation and implementation.
16. The Draft Horizontal Guidelines would however benefit from more detailed guidance on the terms "good faith disclosure" and "reasonable efforts." Moreover, the Draft Horizontal Guidelines should specify that the information provided in the course of the disclosure has to be meaningful enough to allow future implementers of the standard the verification of the claimed essentiality.
17. The Draft Horizontal Guidelines should also confirm that SSO's are not required to impose an obligation on the Members of the SSO to conduct portfolio-wide patent searches.

⁵ Communication from the Commission "Intellectual Property Rights and standardisation", COM(1992) 445final.

⁶ *Ex-officio* Case COMP/C-3/37926, *cf.* Commission Press Release, Commission welcomes changes in ETSI IPR rules to prevent 'patent ambush', IP/05/1565.

18. RIM also notes that there are some SSOs who have dispensed with the obligation for patent declarations entirely. Under such SSO's rules the participants are required, either by signing the membership agreement (by-default licensing) or by giving a general licensing commitment, to license any patent in their portfolios that is necessary to implement a particular specification, or an entire standard. For a by-default licensing scheme such approach is usually coupled with the possibility for the participant to limit the licensing obligation to participants in specific working groups, or by providing an opt-out of the licensing commitment within a specified time frame by identifying a particular patent or patent application that the IPR holder doesn't want to submit to the default licensing commitment required by the respective SDO.
19. While dispensing with patent disclosure obligations has the downside that participants when selecting technologies for standardisation will not know about possible IPRs associated with these technologies, such commitment to license any patent in a portfolio that is necessary to implement a standard, be it through a by-default licensing scheme or by means of a general licensing commitment, has the beneficial effect that unpublished patent applications do not pose an alike threat to the standard-setting process than under a SSO's IPR Policy where the licensing commitment is contingent on the IPR holder first disclosing its essential IPR. Indeed, the identification of patent applications before the standard is agreed is complicated by the fact that most patent laws throughout the world provide for a publication of a patent application only 18 months after the date of application or of its priority. That implies that unless the patent owner is deliberately renouncing to that competitive advantage, there is an appreciable risk that those patent applications remain invisible until the date of their publication. Additionally, given that the commitment to license is irrevocable, many companies do not want to declare a patent application until they have some measure of confidence that the claims of the patent application will be essential to the standard.
20. In the case of an SSO IPR Policy where the disclosure of essential IPR is a prerequisite for obtaining a licensing commitment that licensing commitment would thus be available at the soonest after the publication of the patent application, which may well be only after the standard has been agreed. As a consequence, the Commission could provide additional useful guidance regarding the aforementioned beneficial effects of such default licensing schemes or general licensing declarations. The Commission could for example include these schemes within the exclusion from the application of Article 101(1) TFEU under the condition that the disclosure of essential IPR is then

caught up as soon as feasible, i.e. in a timely manner after the publication of the respective patent application, or upon a determination that the claims in the patent application will be essential.

Section 3: Greater Transparency About License Terms

21. RIM applauds the Commission's clarification in the Draft Horizontal Guidelines that ex-ante disclosures of most restrictive licensing terms, including the maximum royalty rates, will not lead to a restriction of competition within Article 101(1) TFEU (Paragraph 287 of the Draft Horizontal Guidelines). RIM has been amongst the companies who have been advocating an increase of transparency within SDO's and who have seen in the ex-ante disclosures of licensing terms a useful mechanism to complement the concept of FRAND. RIM however believes that a clearer guidance in the Draft Horizontal Guidelines would be helpful to enable the full benefits of such ex-ante disclosures of licensing terms.
22. Based on recent experiences made with unilateral ex-ante disclosures of licensing terms, RIM is of the opinion that even mandatory ex-ante disclosures are unlikely to lead to a true "ex-ante price" absent competition implied by joint negotiations or discussion of licensing terms. Without taking the disclosed licensing terms explicitly into consideration and discussing them during the technical inclusion process there is little chance to have a sensible cost/benefit analysis. Thus, it would be helpful if the Commission clarifies that such disclosures are of more limited value unless they are made while competing alternatives exist.
23. Also, and although RIM agrees that having horizontal competitors jointly discussing or negotiating licensing terms has the potential to raise antitrust concerns and implies risks of collusion⁷, it is RIM's view that a condemnation for joint ex-ante royalty negotiations that mitigate the market power of essential IPR holders conferred by a standard and that alleviate ex-post hold-up and royalty stacking should not be warranted. Especially given a reduction in ex-ante uncertainty on royalty rates can have the potential to reduce the extent to which litigation is needed to resolve issues relating to patent and standards. Thus, the efficiencies and pro-competitive benefits of allowing SSO members to negotiate ex-ante a royalty rate for incorporated technology or to discuss a

⁷ We recognise that possible restraints of trade by having competing companies in one room and discussing price may range from naked collusion by IP holders, to group boycott conduct or buyer cartel behaviour (see also Paragraph 267 of the Draft Horizontal Guidelines).

maximum cumulative rate that would allow for example for the consideration of multiple standards that apply to a single product should be recognised, and the concern of possible anticompetitive effects from joint ex-ante royalty discussions or negotiations should be balanced against the inefficiencies of ex-post negotiations and licensing hold-up, which in itself can be anticompetitive. It is RIM's understanding that such an approach, if carried out ex-ante, in an open and transparent manner, would also be in accordance with the Guidelines on the application of Article 101 of the EC Treaty to technology transfer agreements⁸, which provides in para. 225: "*In certain circumstances it may be more efficient if the royalties are agreed before the standard is chosen and not after the standard is decided upon, to avoid that the choice of the standard confers a significant degree of market power on one or more essential technologies.*"

24. Given that context, RIM is concerned about the phrase used in Paragraph 287: "*as long as the rules do not allow for the joint negotiation or discussion of licensing terms in particular royalty rates*". Despite the caveat in Paragraph 276, this phrase could be interpreted that any kind of joint consideration and discussion of license terms would be unlawful. RIM understands that because of the possible antitrust risks that can go along with joint ex-ante royalty discussions or negotiations, the Commission does not intend to include such rules in the "safe harbour" that avoids the application of the Article 101(1) prohibition. However, in the light of the pro-competitive benefits described above, RIM encourages the Commission to clarify that joint negotiation or discussion of licensing terms does not warrant a *per se* condemnation but should be considered on a case-by-case basis under Article 101(3) TFEU.

Section 4: FRAND And Availability Of Injunctive Relief

25. RIM believes that FRAND has not always proven to be effective under all circumstances. One of the reasons for this is that there is only very limited, if any, ability of SDOs to police anticompetitive conduct by opportunistic participants. RIM is therefore of the opinion that the enforcement of FRAND should not be exclusively left over to the members of the SDO.
26. In this context RIM welcomes the Commission's pointing out that "*the assessment of whether fees imposed for patents in the standard-setting context are unfair or unreasonable will be based on whether the fees bear a*

⁸ Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, 2004/C 101/02

*reasonable relationship to the economic value of the patents” and that „various methods may be available to make this assessment”.*⁹ RIM however submits that when making such assessment due consideration should also be paid to issues that are distinct to complex technology products such as mobile communication devices. For example, a specific problem in the telecommunication space is that multi-mode devices are necessary for the consumer to be able to stay connected as he/she moves freely about Europe. As a consequence and in order to allow an appropriate customer experience, a mobile communication device is required to implement multiple air interface standards such as GSM, GPRS, EDGE or UMTS.

27. RIM concurs with the Commission that the use of the standard must be accessible to all third parties at fair, reasonable and non-discriminatory conditions, and that “*FRAND commitments are intended to prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard and/or charging discriminatory royalty fees*”.¹⁰

28. RIM submits that the Commission should use the opportunity of the Draft Horizontal Guidelines to establish definitively that Article 101(3) TFEU prevents claims for injunctions against prospective licensees that have a bona fide intention to take a license under FRAND terms. The possibility of injunctions has two negative effects on the successful implementation of a standard:
 - a. The prospect of an injunction on essential IPR affects the negotiating strengths of the two parties and has the potential to inflate the royalties that will be negotiated between patent holders and licensees who are using the patented technology. If faced with the threat of an injunction, a manufacturer who doesn't want to run the risk of having its business shut down will be forced to agree to supra-competitive non-FRAND royalty demands that are contrary to Article 101(3) TFEU. Because a profit-maximizing firm is most likely to increase output price when faced with an increase in an input price, it is the consumer who will then ultimately be harmed by higher prices. This is especially true in the context of standardization as a substitution of the standardized technology is very often no longer possible because of lock-in and large sunk costs.¹¹ In

⁹ Cf. Draft Horizontal Guidelines, Paragraph 284

¹⁰ Cf. Draft Horizontal Guidelines, Paragraph 277, 282, 283

¹¹ Cf. Draft Horizontal Guidelines, Paragraph 275

these circumstances a manufacturer's best response to higher unit costs is therefore to pass through some portion of the increase into the selling price.

- b. The exclusion of a player through injunctive relief reduces the likelihood of product or intellectual property innovation by the excluded party thus depriving consumers of potential benefits that would follow from such innovation.
29. As a consequence, the Commission should make clear that injunctions should not be permissible where a prospective licensee has a bona fide intention to take a license on FRAND terms. This should however not prejudice the ability to assert an essential patent defensively in response to an actual or threatened injunction based on a patent claimed as reading on the same product range. In such circumstances, the defendant should be free to use its patents subject to a FRAND commitment in a defensive manner.

Section 5: Reliability Of A Licensing Commitment

30. RIM welcomes the clear guidance in the Draft Horizontal Guidelines with regard to the continuation of a FRAND commitment after an assignment of IPR (Paragraph 286 of the Draft Horizontal Guidelines). It is indeed critical for a robust and effective standards system that those implementing the standards can rely on a FRAND commitment. An owner of essential IPR that is encumbered with a licensing commitment should not be able to evade its commitment by simply transferring the IPR in question. If an assignee was exempt from a licensing commitment he could without impunity claim excessive royalties and use the threat of an injunction to coerce licensees to accept its supra-competitive rates, or although unlikely in practice, block the implementation of the standard by a plain refusal to license the essential IPR.
31. It goes without saying that the consequences of such behaviour would be devastating from a competition law perspective, as the result would be higher costs for licensees and downstream manufacturers, which will ultimately adversely affect the consumer of the final product. However, we believe that the Commission could provide more specific guidance as to what is meant by "all necessary measures". Indeed, whereas it may be sufficient in some jurisdictions to simply put the transferee on effective notice, other jurisdictions would require the inclusion of a specific clause in the agreement explicitly requiring the assignee to assume the licensing commitment of the transferor (and to require the same of any subsequent assignee). Also the Commission

could make clear that the required continuation of a licensing commitment is not restricted to FRAND, but applies to any kind of licensing commitment an IPR holder has entered.

Conclusion

32. Telecommunications are a central element of the European economy. Every day, billions of phone calls are made as people interact for business, cultural and personal reasons. Without a sophisticated telecommunications sector, the European economy would be severely undermined as people are prevented from making the basic interactions required to maintain a modern economy. By definition, the telecommunications industry is a network industry and standards are therefore a critical element of the European telecommunication markets. Without common specifications, various handsets produced by different manufacturers would not be able to interact and the European economy would fragment. It is therefore crucial to ensure that standard-setting processes are conducted in an open, transparent, and predictable manner. RIM welcomes the Draft Horizontal Guidelines as a very good step in the right direction, but would appreciate a clearer guidance in some areas to ensure that holders of essential IPR do not undermine the effective downstream implementation of the standard and that consumers are afforded the full benefit of standardisation.