



**INTERNATIONAL AFFAIRS**

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

Re : Comments in Response to Draft Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements

The U.S. Chamber of Commerce is pleased to have the opportunity to review and comment on the European Commission's current stakeholder consultation with regard to horizontal cooperation agreements. The Chamber includes many U.S. affiliates of multinational companies headquartered outside of the United States, including many of Europe's major multinationals. However, the Chamber prides itself on the fact that 96% of our members have fewer than 100 employees. The Chamber in its comments would like to focus on the portion of the draft Guidelines that addresses standardization agreements.

I. Putting in Proper Perspective Problems Pertaining to Standardization Agreements

Getting the balance right with regard to the interface between standards, intellectual property rights (IPR), and competition is critical. Standard setting needs to remain both voluntary in nature and largely driven by the private sector. Owners of intellectual property need to be afforded the appropriate accompanying rights. Further, governments have a duty to protect and respect those rights and not undermine such rights at a later date both to maintain rule of law as well as to incentivize future innovation. Finally, markets need competition in order to enhance consumer welfare, promote efficiencies, and generate economic growth.

Many thousands of standards are developed each year with no legal issues. We are not aware of any organization that formally tracks the number of standards developed globally. ISO estimates, however, that *approximately 10,000 standards of all types are developed every year*. That is likely a conservative estimate as many standards are not even visible to ISO.<sup>1</sup> The

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<sup>1</sup> Several years ago, one of the Chamber's members asked ETSI and IEEE about the number of standards they produced in a year and the company was given numbers of 2200 and 2000 respectfully.

American National Standards Institute (ANSI), with a membership of some 800 standard setting organizations (SSOs) estimates there are currently 10,000 standards in existence that meet the criteria of American National Standards, yet ANSI has seen very little litigation in relation to those standards or others in which it has participated.<sup>2</sup>

A recent empirical study identified 251 interoperability standards in just one product, a laptop computer, but estimates that the actual number of those standards is significantly higher. The study did not count quality, safety, performance, measurement, environmental, design or manufacturing process, or electromagnetic compatibility standards used in the laptop.<sup>3</sup>

In brief, the problems with a handful of standards should be put in proper perspective. Thousands of standards with pro-competitive benefits are developed every year in hundreds of industries. Each of those standards involves multiple patents, which are licensed royalty free or on RAND terms without controversy. The controversies are outliers and should not drive government policy. Any government intervention in this area should be narrowly tailored to address actual, not perceived, problems.

## II. Impact of EC Standards Policy in Emerging Markets

DG Competition is exploring this complex, but fundamentally complementary and pro-competitive alignment of standards, IPR, and antitrust at a time when many other governments (including the United States and the People's Republic of China) and international organizations such as the OECD are undergoing similar evaluations. The Chamber wishes to urge caution and restraint in determining the role competition authorities should play in applying competition policy to standard-setting bodies and to the standards that emerge from the standards-setting processes.

The Chamber urges a “light-handed” approach in large measure out of concern for the tone of the conversations underway around the world on this important subject. In particular, other governmental authorities with attitudes hostile toward Euro-American companies will be watching for signals they can use to legitimize industrial policies that would undermine both the economic efficiency and the business interests of those companies. For example, China has been revamping its standards system to (i) lessen the “control of foreign advanced countries over the PRC,” especially “in the area of high and new technology”, and (ii) increase the effectiveness of Chinese technical standards as important protective measures or barriers to “relieve the adverse impact of foreign products on the China market.”<sup>4</sup> More recently, China has taken a very interventionist approach to royalty negotiations in the standard setting context.<sup>5</sup>

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<sup>2</sup> ANSI Comments in response to Public Consultation on Proposed Guidelines for the assessment of horizontal cooperation agreements under EU competition law (June 25, 2010). In 1996, the National Institute of Standards and Technology (NIST) estimated there were more than 93,000 standards produced in the U.S. NIST Special Publication 806, Standards Activities of Organizations in the United States (1996 Edition; edited by Robert B. Toth).

<sup>3</sup> Brad Biddle, Andrew White and Sean Woods, “How Many Standards in a Laptop? (And Other Empirical Questions) (Draft May 7, 2010); available: <http://ssrn.com/abstract=1619440>.

<sup>4</sup> See Preface and Part I, Section IV, “Study on the Construction of National Technology Standards System,” Standards Administration of China (September 2004).

At times, it has been suggested in some jurisdictions with emerging competition policies that there are serious and significant concerns with regard to anti-competitive behavior occurring on a rather routine basis within standard-setting bodies which has led to poor standards outcomes and unreasonable licensing terms. As noted in Section I, the reality is that the voluntary, private sector driven standards-setting process has and continues to operate remarkably well in producing standards that efficiently deliver consumer welfare gains.

### III. Governance Practices of Standard-setting Organizations (SSO)

To their credit, at the outset, the draft Guidelines appropriately recognize the efficient and pro-competitive contributions standardization agreements make in the market. However, the draft Guidelines go on to illustrate a series of “competition concerns” many if not all of which are already routinely and effectively dealt with sound and effective governance practices that have long been followed by standard-setting bodies.

It is not surprising that problems in standard setting are statistically so rare because there is no reason to think that SSOs in general cannot take care of themselves and cannot be counted upon to employ good processes (adapted of course to fit particular circumstances and varying from one another in part because of legitimate disagreements about what it best, which are resolved by market experience according to industry needs). SSOs typically have broad memberships and thus collective incentives to find the optimal balance between the interests of IP holders, who need fair compensation; manufacturers, who need access to technology; and customers, whose patronage is needed by both IP holders and manufacturers. SSOs have developed practices that have been tested over time and continue to be refined based on how best to achieve the proper balance between IP holders, manufacturer and customers interests.

Such important governance practices include the need for transparency, the inclusion of all interested stakeholders, and the clear recognition that those stakeholders each are motivated by their own self-interest. Governance principles for standard-setting bodies also require that they be unbiased, offer an unrestricted approach, remain open to the adoption of more than one standard and remain grounded in a voluntary compliance obligations. Typically, there often is a requirement for good faith disclosure with regard to any underlying intellectual property rights that are essential to the use of a potential standard.

In addition, a number of standard-setting bodies have policies that are “participation-based,” where all participants agree in advance that they will license IPR that is technically essential to practice the final standard that is adopted on fair, reasonable, and nondiscriminatory (FRAND) terms with compensation or FRAND terms without compensation. In some SSOs, parties have the ability to opt out of FRAND commitments provided that they disclose early in the process

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<sup>5</sup> See The Supreme People’s Court of the Republic of China Letter to Liaoning Higher People’s Court (July 8, 2008), Min San Ta Zi No. 4; draft Provisional Rules Regarding Administration of the Establishment and Revision of National Standards that involve Patents, Standardization Administration of China (October 2009).

any IPR that may be essential to the standard being developed as well as their intentions to opt in or out of FRAND obligations. Timely disclosure of the IPR and the IPR owner's intention to opt out of FRAND obligations provides other stakeholders the ability to decide whether to award a standard under such conditions. This happens typically because a third party contributed the technology to the standard and the patent holder does not agree. ETSI's disclosure-based policy, for example, encourages early disclosure of potentially essential patents and asks the patent holder to either commit to licensing or disclose that it is not willing to license such essential patented technology on FRAND terms, in which case the SSO attempts to exclude the patented technology from the standard as adopted. These approaches are working well and there have been few problems precisely because such governance practices exist and are being utilized.

In brief, government intervention should be reserved for those unusual situations in which an SSO lacks either (i) the incentive (i.e., where it has narrow membership or an organizational structure biased in favor of a narrow group and does not face sufficient competition from other entities to be disciplined by the market); or (ii) the ability (because of deception) to protect its members and the public.

#### IV. Sound Principles for Government Intervention

Precisely because time tested SSO governance practices are widely followed, few problems arise, leaving little need for outside intervention. When there is a breach, however, the question becomes what role competition authorities should assume and what should be the appropriate response? The Chamber is aware of two narrow situations where government intervention makes sense.

First, competition authorities clearly have a duty to police standard-setting bodies in the event collusion occurs among SSO members that undermines established SSO decision making procedures. Such a clear competition violation is exceedingly rare as standards bodies and their participants are mindful of the fact that price coordination and other similar competition law violations are subject to aggressive enforcement. In addition, many standard-setting bodies have rules that prohibit group discussion of specific licensing terms in order to avoid any buyer cartel or group boycott issues.

Second, to the degree there is outright fraud in the standard-setting process by one of the IP holders; competition authorities should assume a policing role. While the SSO may be an effective self-regulator, some standard organizations are not well equipped to deal with fraud.

Beyond these two narrow circumstances, however, the insertion of a competition regulator into the proceedings of a standard-setting body is troubling and can be quite counterproductive. By intervening, a competition regulator is highly likely to determine the outcome reached in the chosen standard and the terms by which it can be used. Such an influence, at best, is unlikely to produce a measurably better outcome than that which a standards body would have decided independently. At worst, a competition authority's influence could produce a worse outcome and thereby harm competition and reduce consumer welfare.

In the event a competition authority fears a suboptimal standards outcome has been produced in spite of a rigorous, transparent, thorough, stakeholder-engaged process, such an authority should avoid taking an enforceable action. “Imperfect results” in the eyes of an authority centered on concerns over possible foreclosure should not be a concern, particularly in the short term and where standards are voluntary. The market itself, in most cases, given a short period of time will further evolve and an additional standard will emerge.

In addition, competition regulators are rarely well situated to second guess licensing terms pertaining to standards involving intellectual property rights (whether in-bound, out-bound or cross-licensing obligations) that are the result of arms-length bilateral negotiations. Competition authorities must be mindful that in most cases standardization efforts are characterized by good governance practices routinely employed by standards organizations. Therefore while some stakeholders may not be entirely pleased with the final licensing terms painstakingly negotiated, competition authorities aren’t likely to be any better informed to determine the appropriate valuation, market price or other IP licensing terms. Also most implementers entering into a license with a holder of essential patent claims will want to negotiate a customized bilateral agreement that likely will cover more than just those essential claims. After all, the holders of the IP that support the standard have incentives in many cases to license and to do so on commercially viable terms in order to maximize the number of implementers taking licenses and therefore the IP holder’s royalty proceeds.

The draft Guidelines, while correctly pointing out that standard-setting organizations should not discriminate against IP holders and that there should not be a bias either for or against a royalty-free standard, also address at length potential anticompetitive concerns that the Commission believes arise from IP-backed standards. This can be interpreted as tipping the balance away from the protection of essential IP rights implicated by standards, particularly given the very public and high profile comments Commissioner Kroes has made clearly favoring royalty-free offerings, both in her current capacity with the Commission and in her previous role as Commissioner for Competition.

It is important for participants in the standardization process to believe that there is an even handed and unbiased approach on the part of DG Competition. The Chamber has members who as companies have developed business models based on either a royalty-generating or a royalty-free approach, and some members use both depending on circumstances. In a competitive market, both such models should compete, and ultimately users and consumers should decide to what degree each is preferred. Therefore, both governments and standards bodies should remain unbiased and neutral in their approach to each alternative business model.

### Summary

In conclusion, there are only a handful of anti-competitive standards cases that are regularly cited to support the argument of a widespread problem, but there are tens of thousands of standards developed each year that represent model, pro-competitive arrangements. Standards-setting organizations are home to some of the most competitive forces at play in the market. They are well governed and the stakeholders understand the penalty for collusion and fraud. Voluntary standards agreements produced as a result of a rigorous competitive process within private-sector standards bodies have routinely proven to be efficient and pro-competitive forces in the

overwhelming majority of cases, to the benefit of enhanced competitiveness and consumer welfare.

Without meaningful empirical evidence of systemic problems, competition authorities should be both hesitant and cautious in intervening, except where there is collusion or fraud, as such actions are unlikely to produce a better standards outcome or more appropriate IP licensing terms. Because the stakes for innovation and consumer welfare are significant, and the risks of unintended consequences are high, the Commission should not let its policy making in this crucial area be driven by anecdotal concerns. The Commission should also realize that the rest of the world is watching to see what the Commission does in response to its concerns and the public comments provided, and should thus understand the impacts its standards policy will have outside of Europe on its own companies.

The Chamber appreciates the ability to engage and participate in this consultation.