



Comment on the Revised rules for the assessment of horizontal cooperation agreements under EU competition law

I. Introduction

DG Competition of the European Commission is conducting a public consultation on the review of rules for the assessment of horizontal cooperation agreements and invites comments from stakeholders.

W3C is an international community where [Member organisations](#), a full-time [staff](#), and the public, work together to develop [Web standards](#). Led by Web inventor [Tim Berners-Lee](#) and CEO [Jeff Jaffe](#), W3C's mission is to lead the Web to its full potential.

W3C was the first standardisation organisation to enact a Royalty Free Patent Policy. The Policy inspired a lot of policy work in other organisations. To understand our concern with the rules for the assessment of horizontal cooperation agreements under EU competition law, a short abstract on the core rules of this policy and how they were created may help the interpretation of our comments.

In 2000, W3C convened the Patent Policy Working Group. The Patent Policy Working Group evaluated a FRAND regime, but concluded on a Policy based on Royalty Free licensing requirements. This policy was viewed as the ideal compromise balancing the rights of patent holders and the overwhelming desire of most stakeholders to keep the web *open*. The Group had members from large and small industry, from opensource and from society at large and in 2004 enacted the [W3C Patent Policy](#). The policy has effects mainly on organizations participating in Working Groups and contains no default licensing requirements on all W3C Members. Royalty free licensing requirements, a definition of essential claims, an exclusion mechanism if IPR holders do not want to commit their patents and a very innovative set of disclosure rules are the cornerstones of the policy. Field of use restrictions maintain patent holder rights, while at the same time ensuring openness for the limited field of Web infrastructure. W3C systematically asks organisations who join Working Groups to commit to the Royalty Free licensing requirements. The policy was checked with the FTC and the European Commission in 2003 and did not raise any concerns.

W3C hereby submits comments to the following sections:

7.3.3 Standardisation agreements

Paragraph 278

First, with respect to unrestricted participation and the procedure for adopting the standard, the rules for the standard-setting organisation, and in particular its IPR policy, should guarantee that all relevant actors can participate in the process leading to the selection of the standard. Notably, the relevant rules should not exclude or discriminate against specific groups of IPR holders. There should be no bias in favour or against royalty free standards, depending on the relative benefits of the latter compared to other alternatives. The standard-setting organisations should also have objective and non-discriminatory procedures for allocating voting rights.

Comment

W3C considers that its practices, agreements and process meet the condition for unrestricted participation in its standardisation operations. We believe that W3C operations have no restrictive effects on competition. They are intended to create level playing fields that allow for more competition. Together with our Members, we found that a Royalty Free Patent Policy is the best way to achieve that in the area of Web technologies.

Paragraph 278 may be read in several ways: *Notably, the relevant rules should not exclude or discriminate against specific groups of IPR holders.* could be understood to mean that W3C would not be able to require an up front Royalty Free commitment to join a Working Group and that Members must be allowed to participate also on a FRAND basis. This interpretation would undermine the stated goal to keep the Web *open*. A goal that was confirmed by the Member vote on the W3C Patent Policy.

Additionally, Paragraph 278 states that *There should be no bias in favour or against royalty free standards, depending on the relative benefits of the latter compared to other alternatives.* As a matter of fact, a standard without royalty bearing inclusion of IPR is much easier to deploy on the Internet as it is much easier for open source developers to embrace it. In certain areas, especially around Web technologies, there may be a very good reason to make Royalty Free standards and to reference Royalty Free standards in order to deploy new technologies on the Web at a huge scale.

In order to remove the ambiguity, we suggest the following wording as an example for a possible improvement:

First, with respect to unrestricted participation and the procedure for adopting the standard, the rules for the standard-setting organisation should guarantee that all relevant actors can participate in the process leading to the elaboration and election of the standard. The standard-setting organisations should also have objective and non-discriminatory procedures for allocating voting rights. There should be no discrimination concerning participation in the standardisation effort. All, whether IPR holders or not, should be able to participate under the same rules, especially the same IPR policy, that apply equally to every participant.

Paragraph 281

This requires a clear and balanced IPR policy that protects against companies abusing market power with respect to a standard. Thus, the IPR policy should require good faith disclosure of those intellectual property rights that might be essential for the implementation of a standard under development before that standard is agreed. This requires that the IPR holders make reasonable efforts to identify existing and pending IPR reading on the potential standard.

Comment

During the elaboration of the Policy, the W3C Patent Policy Working Group realized that an exhaustive disclosure requirement can have detrimental effects on the standardisation itself. Whether a patent or patent application is really *essential* to a potential standard is often hard to determine. Omitted disclosures can have a negative impact on the patent rights reading on a standard. Consequently, an exhaustive disclosure requirement on all members concerning all *essential* IPR leads to massive disclosures of potentially applicable IPR that may be more or less tangential or orthogonal. The massive disclosure in turn makes implementers feel very uncertain about potential liability risks. Clearing all the risks would trigger very high costs. The result may be a climate of fear, uncertainty and doubt that can lead to hold-ups and delays of the standard.

The W3C Patent Policy Working Group therefore decided to take a different approach:

1. If an organisation participates in a Working Group and thus makes royalty free commitments concerning their IPR, there is no need for disclosure anymore. This eases the burden for the participants as they do not have to engage in costly patent searches within their portfolio once they decided to support a certain technology.
2. Organisations not participating in a Working Group only have a disclosure obligation if they receive a *disclosure request*. Those requests are integrated into the Drafts and thus are triggered if a member reviews such a Draft thus showing interest. In case there are additional hints and doubts, W3C can make *special disclosure requests* to organisations suspected to have IPR essential to the implementation of the Draft in question.

To be able to preserve its disclosure regime, W3C suggests to tone down the requirement in Paragraph 281 to oblige all members of a standardisation organisation to identify essential IPR to all Drafts and standards of that organisation. One way to do so would be to include a condition:

This requires a clear and balanced IPR policy that protects against companies abusing market power with respect to a standard. If an impact on competition is possible, namely by the collection of royalties, the IPR policy should require good faith disclosure of those intellectual property rights that might be essential for the implementation of a standard under development before that standard is agreed. This requires that the IPR holders make reasonable efforts to identify existing and pending IPR reading on the potential standard.

For questions about W3C or the answers here, please contact Rigo Wenning (rigo@w3.org)