

THE NEW HORIZONTAL GUIDELINES: STANDARDISATION

*Imelda Maher*¹

ABSTRACT: This article provides an overview of how standardisation agreements are viewed under the European Commission guidelines as well as the Commission DG for Enterprise White Paper on standardisation of Information and Communication Technologies, the latter being a necessary part of the regulatory framework for standardisation agreements in the EU. It suggests that as the Guidelines see the pro-competition effect of standardisation agreements as the norm, A101 will not generally be applicable and the antagonistic interface of standardisation agreements and A101TFEU will be exceptional, but a role for A102TFEU remains.

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1. INTRODUCTION

Standardisation agreements are agreements that have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply.² This definition is provided by the Commission 2011 Guidelines on horizontal co-operation agreements which set out the principles for the assessment under A101TFEU of various categories of horizontal agreements, including standardisation

1 Sutherland Professor of European Law, UCD Sutherland School of Law, University College Dublin. An earlier version of this paper was presented at the Irish Society for European Law Competition Law Forum, A & L Goodbody, Dublin, 23 March 2011.

2 See paragraph 257, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements OJ C 11, 14.1.201, p. 1.

agreements, the focus of this article.³ Standardisation agreements can both benefit and restrict competition and hence fall under the scrutiny of DG Competition and are discussed within the Guidelines. The Commission acknowledges that such agreements produce positive economic effects e.g. by improving market interpenetration and encouraging the development of new and improved products. Thus normally standardisation agreements increase competition and lower outputs and sales costs – benefitting the consumer.⁴ Nonetheless, it notes that there are specific circumstances where such agreements can restrict competition through reduction of price competition, foreclosure of innovative technologies or exclusion or discrimination against firms who are denied access to an effective standard.⁵ The fact the Guidelines see the pro-competition effect of standardisation agreements as the norm, suggests that A101 will not generally be applicable and the antagonistic interface of standardisation agreements and competition rules will be exceptional.

This article provides an overview of how standardisation agreements are viewed under the European Commission guidelines as well as the Commission DG for Enterprise White Paper on standardisation of Information and Communication Technologies.⁶ The White Paper acknowledges that the discussions on ICT standardisation are subject to the competition rules but nonetheless, it is useful to have regard to it as part of the regulatory framework for standardisation agreements in the EU.

2. THE GUIDELINES

2.1. Overview

Consistent with the re-framing of the guidelines on horizontal co-operation⁷, chapter 7 on standardisation is more detailed than in the past. The wording

3 Ibid. Hereafter the Guidelines.

4 Guidelines, para. 263.

5 Guidelines, para. 264. Farrar notes that pricing is often discriminatory in standard-setting contexts where licensing negotiations are bilateral and the variation in firm's circumstances allow for discrimination – even within the terms of A101 i.e. sameness being treated differently and difference being treated the same. It is difficult in her view to disentangle the anticompetitive elements here and in the absence of clear criteria for distinguishing harmful from non-harmful discriminatory licensing; a careful case-by-case analysis is needed see Farrer, 2010.

6 EC Commission, 2009.

7 Van Bael & Bellis, 2011.

of A101 TFEU is followed closely. Those agreements that have as their object the restriction of competition are first analysed. Then criteria are provided which, if met, would place those agreements outside A101.⁸ Most notably in the absence of market power⁹ A101 is not applicable thus where there is a number of competing voluntary standardisation agreements, these will fall outside A101. Finally, there is a discussion of the A101(3) criteria in relation to standardisation.

2.2. Object or Effect of an Agreement

The guidelines state that agreements that use a standard as part of a broader restrictive agreement aimed at excluding actual or potential competitors are considered to restrict competition by object.¹⁰ For instance, an agreement whereby a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard would fall into this category.¹¹ The guidelines then turn to those agreements that may have the effect of restricting competition. The Commission notes that where an analysis is made of the effect of an agreement regard must be had to the legal and economic context and the likely effects on the market concerned including the market shares of the goods or services based on the standard.¹² As van Bael and Bellis note, one of the difficulties with this categorisation is that it is difficult to draw a clear distinction between practices that have as their object the restriction of competition and those that have such an effect, in particular since the ‘object’ box is not yet closed.¹³ The difficulties in categorisation can be seen in the GlaxoSmithKline case where the General Court was found to have erred in law on appeal to the EU CJ.¹⁴ The case concerned dual pricing of parallel exports in pharmaceuticals. The GC required some disadvantage to final consumers in terms of price or supply for an agreement relating to parallel trade to be found to have as its

8 Section 7.3.3.

9 Paragraph 277.

10 Guidelines, para. 273.

11 Pre-insulated pipes Commission decision IV/35.691, OJ L 24, 30.1.1999, p. 1,

12 Guidelines, para. 296.

13 Van Bael & Bellis, 2011b.

14 Although the appeal was ultimately dismissed see Cases C-501/06P, C-515/06P and C-519/06P, GlaxoSmithKline Services Unlimited v. European Commission [2009] ECR I-9291. For the General Court judgment see Case T-168/01, [2006] ECR II-2969.

object the restriction of competition, contrary to Article 101(1). The EUCJ overruled this reasoning holding that there was no need to establish such a disadvantage to show an anticompetitive object, noting that the aim of A101 is not only to protect the interests of consumers and competitors but also the structure of the market.¹⁵

2.3. Standard Terms

The guidelines include standard terms as well as standards to the extent that they establish standard conditions of sale or purchase between competitors and consumers for substitute products. The terms will be analysed in their economic context to evaluate their effect on competition. The general principle is that if the setting of the terms is unrestricted for competitors, the terms are non-binding and effectively accessible for anyone, and then there is unlikely to be an anticompetitive effect. The guidelines recognise that terms can be drawn up by trade associations or competitors so a functional analysis of the nature of the SSO is more important than form.

The two exceptions to the general principles identified are where the standard terms define the scope of the product sold to the end consumer (e.g. in insurance) because there may be a de facto alignment of terms between competitors, and where the standard terms are a decisive part of a transaction (e.g. on-line shopping and the need for secure payment systems) again they may become the de facto standard. Even if the terms are binding however, this is not necessarily fatal. However, any standard terms that contain provisions likely to have a negative effect on competition relating to prices (e.g. by defining the type of rebates to be given) will be likely to restrict competition within the meaning of Article 101(1) TFEU.

2.4. Standard-setting Organisations (SSOs)

Standardisation bodies can be self-regulatory bodies that necessarily represent the interests of their members and aim to advance those private interests which may or may not be consistent with competition law. The Commission notes that standardisation bodies can be public bodies or consortia through to independent companies.¹⁶ Thus both public and private

¹⁵ At para. 63.

¹⁶ Footnote 1 in the guidelines. For a discussion of the application of the competition rules to public or private standardization bodies, see Cafaggi, 2007:31.

arrangements are included in the Guidelines and EU standard-setting bodies are expressly included insofar as they are undertakings within EU competition law.¹⁷ Where public bodies are acting in the interests of their members qua undertakings, then they are subject to competition norms. Where standardisation bodies are carrying out regulatory functions that are in essence public in nature, they are (or at least should be) subject to the sorts of constraints imposed on the exercise of public power viz. rule of law principles such as transparency, consistency, and accountability, and fall outside the scope of A101.¹⁸ This means that the preparation and production of technical standards as part of the exercise of public powers are excluded as is the regulation of the liberal professions.¹⁹

The guidelines provide quite far-reaching recommendations on the internal procedures for standard-setting bodies²⁰ which may reflect the Commission's experience in Rambus, (a patent ambush case)²¹ and Qualcomm (a non-FRAND licensing case²²).²³ Koenig & Spiekermann note that more ad hoc private arrangements are favoured in the US while in the EU more uniform and formalised standardisation systems are chosen.²⁴

3. STANDARDISATION AGREEMENTS: SAFE HARBOUR

DG Enterprise and the WTO see standardization agreements as characterized by four features: openness (of decision-making and membership for all

17 See Annex I of Directive 98/34EC laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L 204/37, 21 July 1998, which lists the EU standard-setting bodies: CEN, CENELEC, and ETSI. A list of national bodies is provided in Annex II.

18 Scott, Caffagi, & Senden, 2011 and Harlow, 2006.

19 They have been subject to separate scrutiny by the Commission both through individual decision and through advocacy, with a report published on the liberal professions in 2004: see EC Commission, 'Report on Competition in Professional Services' COM(2004) 83 final, and the follow-up to it, 'Professional Services – Scope for more Reform' COM(2005) 405 final. Competition law constrains those professional activities that may have an effect on the market and are not ethical/ public law activities.

20 See the Guidelines paragraphs 280-286 in particular.

21 The case, brought under A102TFEU on the basis of abuse of dominance, was settled under an A9 Regulation 1/2003 commitment decision OJ L 1/1. See Commission decision Case COMP/38.636, 9.12.2009.

22 The investigation was based on A102TFEU and abuse of dominance through excessive pricing for patented technology incorporated into a standard but was subsequently dropped see European Commission Press Release MEMO/09/516, 24/11/2009.

23 I. Van Bael & Bellis, 2011a.

24 Koenig & Spiekermann, 2010.

interested actors), consensus (no particular stakeholder interest favoured), balance (participation is available at any stage in the decision-making process), and transparency.²⁵ These can be referred to as the golden rules of standard-setting processes.²⁶ The requirements of transparency and openness are also found in section 7.3.3 of the Guidelines and reflect the rule of law requirements that Harlow suggests should apply to private regulators carrying out what may be construed as a public function.²⁷

The safe-harbour provided by the Guidelines specifies when such agreements may fall outside the A101(1) prohibition entirely, providing slightly different criteria.²⁸ The criteria in the Guidelines address process (unrestricted participation and transparency) which is the focus of the WTO and White Paper. It adds two criteria (alternative standards and licensing on the basis of FRAND), concerned with market foreclosure and discrimination – the two main issues of concern in the competition context.

The Guidelines note that failure to meet any of the criteria identified is not fatal given that there are different models for standard-setting – it just requires greater self-assessment under A101(1) and A101(3) in order to determine the effect of the agreement on relevant markets.²⁹ To determine whether or not the agreement falls within A101(1) the SSO would need to have regard to the market share of the goods or services that will be based on the standard; ensure that there was no discrimination against existing or potential members; whether participation in the standard-setting procedure is open to all market players; the possibility of the development of alternative standards by SSO members, accessibility of the standard; and the market shares of the goods or services based on the standard, and the ex ante disclosure of the most restrictive licensing terms.³⁰ Thus standard-setting organisations are free to establish their own rules even if they differ from those in the guidelines

25 See EC Commission, 'Modernising ICT Standardisation in the EU – The Way Forward', COM(2009) 324 final (2009) s. 2.1.

26 Koenig & Spiekermann, 2010, refer to the five golden rules. These map more or less onto the guidelines list but for the requirement that there be no pre-definition of a standard during the process of standard-setting.

27 Harlow, 2006.

28 Guidelines, para. 280.

29 Guidelines, para. 279.

30 Guidelines, para. 292-300.

provided they do not breach the competition rules. In other words, these criteria are sufficient but not necessary conditions.³¹

3.1. Unrestricted Participation

The Guidelines state that access must be open and non-discriminatory for all competitors in the market affected,³² identifying four potentially relevant markets: product/service markets to which the standard relates; where technology and/or IPR are involved, then the relevant technology market; the market for standard-setting if there are different standard-setting bodies involved and the market for testing and certification. Voting rights need to be allocated on an objective basis with objective criteria for technology selection, so no particular interest is favoured.³³ The guidelines note that the presence of competition between SSOs and standards may remove any restriction on competition even if participation is restricted.³⁴ Where it is necessary to restrict membership of the standard setting body in order to determine a standard, then keeping other stakeholders informed and consulting them may be sufficient.³⁵ This highlights the relationship between standard-setting and transparency.

3.2. Transparency

In the White Paper, the suggestion is that standard-setting organisations should take account of all stakeholder interests – with the Guidelines noting that the greater the transparency the more likely that stakeholders interests will be considered.³⁶ This requires that standard-setting procedures are such that stakeholders can inform themselves of up-coming, ongoing and finalised standardisation work in good time. Then participation should be possible at any point in the process.³⁷

31 Lévêque & Baron.

32 At para. 261.

33 At para. 281.

34 At para. 296.

35 At para. 295.

36 At para. 296.

37 At para. 282.

3.3. Alternative Standards

The Guidelines require that there should be no obligation to comply with the standard i.e. it is not mandatory for the product/service to appear on the market. This refers to full products and there is less concern about minor aspects of part of end products. If there is no alternative in relation to a relatively minor component this will be less significant than a standard that is a major and essential part of the product.³⁸ This encapsulates the notion of voluntariness which is important in relation to private or co-regulation. Scott notes³⁹ that the standards set by standardisation agreements may not allow for other standards. Compliance may be essential to achieve market participation raising questions as to market foreclosure. Thus voluntariness is a key consideration in evaluating the impact of such arrangements on competition.

3.4. FRAND⁴⁰

The final condition set down in the guidelines for the agreement to fall outside A101(1), is that access to the standard must be on fair, reasonable and non-discriminatory terms.⁴¹ FRAND is usually associated with the licensing of intellectual property rights (IPR) and hence will be discussed in that context, even though, as the Guidelines makes clear, access to a standard on a FRAND basis, may not involve IPR.

3.5. IPR and Standard-setting⁴²

A recent study of the 11 most important SSOs found that that around 250 distinct standards had technologies covered by one or more declared IPRs, with patents being the most common but not the only IPR involved.⁴³ The same study found that the distribution of IPR among standards was skewed

38 Guidelines, para. 293.

39 Scott, 2010.

40 On a fair, reasonable and non-discriminatory basis. For a discussion on FRAND see for example, Chappatte, 2009; Gérardin & Rato, (2010: 129; Chappatte, 2010. RAND is also a commonly used term, the argument being that 'fair' necessarily implies reasonable and hence is unnecessary see Valimaki, 2008.

41 Guidelines, para. 280.

42 For a discussion of recent issues relating to standard-setting and patents written by DG Comp officials see Hellstrom & Kramler, 2012.

43 Blind, Bekkers, Dietrich, Iversen, Köhler, Müller, Pohlmann, Smeets & Verweijen, 2009.

with a small number of standards requiring many patents and ownership generally being limited to a small number of firms. Patents are particularly important in information and telecommunications technology where standard-essential patents are common.⁴⁴ Hence, SSOs need to have policies on patent disclosure and licensing of those patents on a FRAND basis should the patents be read onto the standard. This is to prevent patent ambushing of a standard after it has been adopted.

The Guidelines suggest that FRAND access to the standard will be more likely where the industry involved has a clear and balanced IPR policy adapted to its needs and those of the SSO.⁴⁵ This echoes the White Paper where the Commission noted in its reports on responses to consultation that the SSOs implement IPR policies that are clear, balanced, non-discriminatory and allow competition between different business models. Such an IPR policy would require participants to provide an irrevocable commitment in writing to license their IPR to all third parties on FRAND terms prior to the adoption of the standard.⁴⁶ The IPR holder could exclude specified technology from the standard-setting process provided that occurs at an early stage in the process. One issue here however is that it is not clear how an early stage is specified. Effectiveness also requires the commitment to remain binding on transfer of the IPRs to any buyer.⁴⁷ A clear and balanced IPR policy would also require good faith disclosure by IPR holders of IPR that might be essential⁴⁸ though the language in the Guidelines is not absolutely mandatory and the use of other disclosure models is expressly discussed in paragraph 298 noting a case-by-case analysis would be required, the test being whether an informed choice has been taken vis a vis technologies and associated IPRs. There is some discretion here – firms do not have to positively state that they have no IPR reading on the potential standard. A simple declaration that the firm is likely to have IPR claims will suffice.⁴⁹

44 Dolmans & Ilan, 2012.

45 Guidelines, para. 283-284. Fair reasonable and non-discriminatory access goes beyond IPR of course see the Guidelines para 294, para. 297.

46 Such a commitment is not necessary where access is given on a royalty-free basis see Guidelines, para. 286.

47 Guidelines, para. 285.

48 Guidelines, para. 286.

49 Van Bael & Bellis, 2011a.

If the SSO's IPR policy provides for individual disclosure by IPR holders of their most restrictive licensing terms (including maximum royalty rates) prior to adoption of the standard then this will normally not lead to competition issues. This unilateral *ex ante* disclosure of most restrictive licensing terms, according to the Guidelines, is one way to ensure that the parties involved in the selection of a standard are fully informed not only as to the available technical options but also as to the likely cost of the IPR.⁵⁰ This goes some way to meet concerns about hold-ups where parties may be agreeing standards in dynamic scenarios where the market for standardised technology has not yet emerged.⁵¹ However, where there are competing standards, then limitations on access may not produce restrictive effects on competition.

The guidelines discuss what constitute fair and reasonable fees.⁵² The SSO does not have to verify whether the fee meets the FRAND commitment – that is for each participant. This is perhaps just as well, as Valimaki points out that many SSOs do not define what FRAND means in any detail and while the disclosure of licensing terms in advance can go some way to mitigating the acceptance of FRAND terms, it is not a perfect solution: technical discussion can get diverted into legal disputes on licensing, the licensor does not know what uses the licensees may have for the licensed product and may not want to be bound before so knowing. Even if there is disclosure of licensing terms when the standards are being agreed, they still bind newcomers.⁵³ One suggested means for assessing whether the fees bear a reasonable relationship to the economic value of the IPR is to compare the licensing fees charged before the standard was adopted (*ex ante*) with those charged after the industry has been locked in (*ex post*), although it is acknowledged that comparison may not be consistent or reliable.⁵⁴ Alternatively, an independent expert assessment could be made of the relevant IPR portfolio's "objective centrality and essentiality" to the standard at issue.⁵⁵ The guidelines are careful to note that these are by way of example only. And in practice, it may be difficult to value the quality

50 Paragraph 299.

51 Lévêque & Baron.

52 FRAND is also referred to in the Commission Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements OJ C 101/2, 27.4.2004 see para. 167 in relation to cross-licensing,

53 Valimaki, 2008.

54 Guidelines, para. 289.

55 Guidelines, para. 290.

and relevance of particular patents, and in fact, a flexible approach to FRAND may be the best, where it is supported by the non-discrimination principle.⁵⁶

The guidelines seek to be pre-emptive by resolving the matter of IPR and standard-setting before it comes to individual negotiations on particular standards. Resolving these matters is complex. For example, the European Commission is currently concerned that FRAND requirements are being circumvented by the holders of standard-essential patents through the use of injunctions. Hence a Statement of Objections was issued against Samsung at the end of 2012 even though it had withdrawn its applications for injunctive relief that were pending in five Member States. The Commission has emphasised that patent holders should be able to use injunctions but that in the specific context of standard-setting and standard-essential patents, the use of injunctions to get around FRAND requirements may constitute an abuse of dominance contrary to A102.⁵⁷

3.6. A101(3)

Even where an agreement may fall within A101(1), it may still benefit from an exemption under A101(3) where there are efficiency gains.⁵⁸ For example, standards that create compatibility on a horizontal level between different technologies are likely to give rise to efficiency gains.⁵⁹ Dissemination of how to apply the standard must be available to those wishing to enter the market – thereby avoiding market foreclosure.⁶⁰ The standardisation agreement must be indispensable with regard being had to the effect on the market and the scope of restrictions that go beyond achieving efficiencies.⁶¹ Participation should be open, unless such openness can be shown to lead to inefficiencies. Standards are limited to no more than necessary and the Guidelines note that where there is only one technological solution, the standard must be set on

56 M. Valimaki, 2008.

57 On 18.10.13 the Commission decided to market test commitments proposed by Samsung, see OJ C 302/14.

58 Guidelines ch. 7.4. This section highlights the provisions relating to standardisation agreements.

59 Ch. 7.4.1. The use of standard terms is seen as facilitating comparability and hence of switching.

60 Para. 309. The Guidelines note that a logo can be used to show compliance, while recognising that certification and testing are usually separate agreements and markets, para. 310.

61 Guidelines ch. 7.4.2. In general standard terms cannot be binding, though the Guidelines note that such binding terms may in a specific case be indispensable see para. 320.

a non-discriminatory basis.⁶² The Guidelines state that in principle, making a standard obligatory and binding is not indispensable.⁶³ Where a particular body is assigned to test and certify the standard, the exclusivity and fees charged have to be justified.

As well as being efficient and indispensable, the efficiencies must be passed onto consumers.⁶⁴ This is presumed where the standard facilitates interoperability or leads to competition between different products. Regard is also had to the procedures designed to protect the interests of users and end consumers. Finally, whether the standardisation agreement eliminates competition should be assessed having regard to the various sources of competition in the market, the level of competitive constraint that they impose on the parties and the impact of the agreement on that competitive constraint.⁶⁵

4. CONCLUSIONS

The fact that standardisation agreements need to meet certain criteria (or variations thereof) in order to fall outside A101 (1), suggests that the regulatory space they create is contested.⁶⁶ It is a regulatory space because it has rules governing membership, how rules are devised and how they are disseminated. Because the regulatory space is contested it cannot be exclusively self-interested but takes place in a wider context where competition law for example acts as a necessary constraint to which the private actors must have regard.

Challenges remain. It is not clear from the guidelines how differences as to fees for patent use will be resolved. The Guidelines support the idea of a wide membership of an SSO (pure innovator, pure manufacturers, vertically integrated firms and product buyers and sellers) or wide consultation. This has the consequence of bringing in a wide range of actors with different interests

62 Para. 317.

63 Para. 318.

64 Ch. 7.4.3. The Guidelines note that there is increased risk to competition where there is increased market share of firms and standard terms. At the same time, there are clear benefits (reduced costs, comparability, legal certainty) in using standard terms leaving it to a case-by-case analysis. This suggests that where there is high market share, it will be more difficult to show that standard terms allow those efficiencies to be passed onto consumers.

65 Ch. 7.4.4.

66 For a discussion of the concept of regulatory space, see Hancher & Moran 1989.

and views on what is FRAND, making it difficult to determine what FRAND is in any particular case.⁶⁷

Standardisation also occurs in highly dynamic technical markets (some of the time at least) and it is not clear that full account has been taken of this in the guidelines. Over-declaring of ‘essential’ patents and patent stacking may become/remain features of standard-setting. There is a big debate in the literature as to the prevalence or otherwise of patent hold-ups.⁶⁸ Drexl et al suggest this will become more common as upstream firms only engage in technical R&D earning their money from licensing.⁶⁹ These firms will have less interest in patent pooling but such hold-ups are best addressed through A102 TFEU, and it is in the context of that other competition prohibition that the interaction of standard-setting and competition is most likely.

67 Gérardin, 2010: 5. For a recent discussion of FRAND in the context of A102TFEU and the Microsoft litigation (most recently T-167/08 Microsoft Corp v. European Commission, 27 June 2012) see M. Dolmans, Ilan & Colebrook, 2012.

68 See e.g. the discussion in Gérardin, 2010.

69 Drexl, Frueh, Mackenrodt, Ullrich, Picht & Pulyer, 2010.

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