ECIS European Committee for Interoperable Systems

ECIS ivzw-aisbl
Louizalaan 65 avenue Louise Box 2
B-1050 Brussels, Belgium

T/F +32 (0)2 706 24 15
info@ecis.eu
www.ecis.eu

# ECIS' comments in reply to the public consultation on the revised rules for the assessment of horizontal cooperation agreements under EU law

Brussels, 29 June 2010

## I. Introduction

The European Committee for Interoperable Systems ("ECIS") welcomes the opportunity to comment on the revision by the European Commission (the "Commission") of the current Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") to horizontal cooperation agreements ("Draft Horizontal Guidelines"). Given ECIS' particular focus as an organisation on interoperability and standards, it will focus its observations on the section in the Draft Horizontal Guidelines relating to standardisation agreements.

ECIS in particular applauds the Commission for seeking to clarify the following issues in the context of the Draft Horizontal Guidelines:

- Establishing a clear preference for open, democratic and transparent standards setting processes;
- Requiring that all holders of essential IPRs in technology that is to be adopted as part of a standard make their IPRs accessible on fair, reasonable, and non-discriminatory ("FRAND") terms, and seeking to provide guidance concerning the interpretation of FRAND;
- Requiring undertakings that acquire IPRs covering technologies that are part of a standard to be bound to a FRAND commitment provided by the previous IPR owner;
- Acknowledging the legitimacy of the rules of Standards Setting Organisations ("SSOs") which allow or require under certain circumstances all holders of IPRs that participate in the standards setting process to disclose *ex-ante* their most restrictive licensing terms.

Nonetheless, ECIS would like to raise the following concerns with the Commission, which it would welcome to see addressed in the final version of the Guidelines:

- The requirement in the current Draft Horizontal Guidelines that IPR policies should contain "*no bias in favour or against royalty free standards*" may discourage SSOs from favouring royalty free standards, and therefore it should be clarified;
- The Draft Horizontal Guidelines should explicitly state that the FRAND commitment also means that under relevant circumstances licences can be granted under royalty free terms;

- The Draft Horizontal Guidelines in paragraph 282 should clarify who is subject to the FRAND commitment obligation;

- The Draft Horizontal Guidelines should clarify that the penalty in case of infringement of the FRAND commitment by the IPR holders should be to require the latter to comply with their commitment, and not to declare the standardisation agreement null and void under Article 101 (2) TFEU;

- The IPR holders who have given a FRAND commitment should under the Draft Horizontal Guidelines not be allowed to obtain an injunctive relief against a licensee who has declared itself ready to accept the FRAND terms of the licence unless under exceptional circumstances;

- Paragraph 287 of the Draft Horizontal Guidelines should be redrafted to avoid any misunderstanding that any joint discussion or negotiation of licensing terms must be prohibited. Such misunderstanding could lead to the conclusion that any agreement to set royalty rates at zero is anti-competitive under Article 101 (1) TFEU. In addition, opponents of *ex-ante* disclosure may use such a general reference to any joint discussion or negotiation in their favour by interpreting what joint discussions or negotiations of licensing terms (and in particular royalty rates) entail broadly; and

- Paragraph 305 should be rephrased to focus on the need of an objective conformity test and the grant of a conformance mark that any implementer of the standard will be able to use in the future. ECIS underscores that, contrary to what the Commission believes is the main concern, granting certain bodies an exclusive or non-exclusive right to test compliance with the standard is not a determinative factor in assessing the pro- or anti-competitiveness of such a standardisation agreement.

## II. Open, democratic and transparent standards setting process

In paragraph 277, the Draft Horizontal Guidelines acknowledge that "*[w]here participation in standard-setting, as well as the procedure for adopting the standard in question, is unrestricted and transparent, standardisation agreements which set no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms that do not restrict competition within the meaning of Article 101(1).*"

ECIS has repeatedly stressed that for a standard to be considered open and pro-competitive, it should have been developed in compliance with a collaborative and democratic standards development and management process that is transparent and open to all, and that the approval of the standard should have been based on a consensus among participants obtained through due process. Hence, ECIS supports the Commission on that statement.

Nonetheless, ECIS underscores a weakness in the Draft Horizontal Guidelines in paragraph 278, where the current text reads as follows:

> "*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***."

ECIS believes that the wording of the second and third sentences of the current text of paragraph 278 does not provide sufficient clarity. On the contrary, it appears to prohibit IPR policies of SSOs that either mandate or encourage royalty free licensing, as that would constitute a "*bias in favour [...] [of] royalty free standards*." The wording "*depending on the relative benefits of the latter compared to other alternatives*" seems to complicate things more as it is rather unclear what the author of the document intends to say.

Considering that almost all of the most important current standardised technologies – especially those related to the World Wide Web – are available on a royalty free basis, and royalty free standards are actively promoted by organisations such as OASIS and the World Wide Web Consortium ("W3C"), it is important that the revised text of the Horizontal Guidelines will not undermine the successful approach of W3C, OASIS and others to standards licensing. The Internet would not have been developed as we experience it today were it not for royalty free standards. Furthermore, royalty free licensing of standardised technologies is crucial for their implementation in open source software, which has developed into an important source of competition in many software markets, and which by definition cannot support royalty bearing licensing.

ECIS understands that the Commission's general approach in the Draft Horizontal Guidelines is to promote equal access to the standards setting process. Given the importance of royalty free licensing and open source software in competition, ECIS calls on the Commission to amend paragraph 278 to allow SSOs to freely adopt royalty bearing or royalty free approaches. The rules should allow SSOs to choose a licensing policy according to their needs, to the extent that their choices allow all competitors to viably compete with each other, including those competitors who require access to the standard to be based on a licensing policy that does not involve royalties.

## III. A FRAND commitment

ECIS supports the Commission's approach described in paragraph 282 that "*all holders of essential IPR in technology which may be adopted as part of a standard [should] provide an irrevocable commitment in writing to license their IPR to all third parties on fair, reasonable and non-discriminatory terms ("FRAND commitment").*" However, ECIS underscores the need for the Draft Horizontal Guidelines to acknowledge the different practices related to standards licensing that are used in the software sector and in telecommunications.

In the ***software sector*****,** the Draft Horizontal Guidelines should recognise the well-established practice that patents deemed essential to implement standardised software technologies are available royalty free. Hence, any IPRs essential for the implementation of a standard should be made available royalty free in a manner that permits implementation in open source systems, including software licensed under the GPL, the most widely used open source licence, with no licensing restrictions other than reciprocity and defensive suspension.

In ***telecommunications***, on the other hand, the common practice is that standards are available under royalty bearing licences available under FRAND terms. In this sector, a model should be adopted that would be based on the principle that the cumulative royalty burden remains at a reasonable level in the sense that the standardised technology is commercially

viable. Individual royalty rates should in principle be proportionate to the respective contribution each patent owner brings. According to this system, owners of intellectual property should be required to offer a standard FRAND licence for their essential patents for each category of licensee, at a reasonable royalty rate, free of any non-assertion provisions and grant-backs. Owners of intellectual property could require reciprocal licensing of any essential patents on FRAND terms by any licensee to its essential patents. Intellectual property owners could then engage in negotiations with any given licensee over other provisions such as cross-licensing terms or non-assertion provisions, so long as the intellectual property owners' FRAND offers remain available to licensees (the "Shapiro System").

ECIS therefore suggests that the Draft Horizontal Guidelines should explicitly state that the FRAND commitment can, under relevant circumstances, mean that licences can be granted royalty free, and also acknowledge the differences between the software and the telecommunications sectors.

In addition, paragraph 282 of the Draft Horizontal Guidelines does not clarify who is subject to the FRAND commitment obligation. The draft talks about "*all holders of essential IPR in technology which may be adopted as part of a standard,*" without providing clear guidance whether it refers to anyone involved in the formulation of a standard, to anyone who is a member of an SSO (but not a participant in the formulation of the standard), to outsiders who were aware of the proposed standard and remained inactive, to outsiders who objected, or even to outsiders who were unaware of the standards work. The consequences of any difference existing between each interpretation can be significant. If the draft refers to anyone involved in the formulation of a standard, then a member company that has IPR essential to a standard may not wish actively to get involved in the formulation of that standard, while having no interest in enforcing any IPR against the implementers of the standard. On the other hand, if the draft refers to anyone who is a member of an SSO, then members may be required to engage in extensive searches of their patent portfolio even if they are holding IPRs for defensive purposes. It is important to acknowledge that identification of essential IPRs and disclosure of licensing terms is key specifically for the IPRs deemed essential for the standard.

Furthermore, ECIS acknowledges that paragraph 286 of the Draft Horizontal Guidelines, according to which all IPR holders who provide a FRAND commitment should be required "*to take all necessary measures to ensure that any undertaking to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment*" points in the right direction. This statement arises from recent examples such as the IPCom case investigated in Germany, the European Union, and elsewhere, where the responsible authorities or the judiciary in some of the cases had to deal with the question of whether the FRAND commitment given by the initial rights holder was transferred together with the ownership of the IPRs or not.

In addition, the Draft Horizontal Guidelines should clarify that if the duty to provide a FRAND commitment is violated, then the penalty will not be to declare the standard null and void under Article 101 (2) TFEU. Such a penalty would merely punish the victims and also have negative impact in cases where the standard is already implemented or the industry is "*locked in*." On the contrary, the remedy should be to require IPR holders to comply with their FRAND commitment, which the Commission should be entitled to demand under the principle of "*effet utile*" – that every remedy under competition law should have useful effect in restoring competition.

Finally, the Draft Horizontal Guidelines should provide that IPR holders who have given a FRAND commitment should not be allowed to obtain an injunctive relief against a licensee who

has declared itself ready to accept the FRAND terms of the licence unless (a) the licensee explicitly stated that it will not accept terms that have been found by a court to be FRAND; (b) the licensee is in irreparable breach of the FRAND terms of the licence; or (c) the licensee is not willing to license its own essential patents on a standardised technology under FRAND terms. This provision will also be consistent with Article 20 of the Draft Council Regulation on a European Union patent ("Draft EU Patent Regulation") regarding Licences of Right. ECIS strongly supports a voluntary system under Article 20 of the Draft EU Patent Regulation, which will provide wider access to technology required to achieve software interoperability and access to the standardised software technologies. According to this system, any person interested in using the patented invention to manufacture and market interoperable software will be able to obtain a licence to use the essential patent for that purpose.

## IV. A requirement for *ex-ante* disclosure of licensing terms

ECIS believes that paragraph 287, which recognises the need to require the *ex-ante* disclosure of most restrictive licensing terms, points in the right direction regarding *ex-ante* disclosures of licensing terms in the ICT industry and their compatibility with competition laws. Nonetheless, similar to the distinction that applies in the case of the FRAND commitment between the software and the telecommunications sector, the Draft Horizontal Guidelines should also acknowledge the differences between the two sectors in the context of the *ex-ante* disclosures of licensing terms. A more nuanced approach is imperative, which recognises that *ex-ante* is by no means a "one size fits all" solution for all sectors.

In the **software sector**, to avoid patent hold-ups, the IPR policies of SSOs should require disclosure of licensing terms and conditions, and of commitments to reasonable and non-discriminatory terms, before any software standard is adopted.

In complex technology areas such as ***telecommunications***, on the other hand, there are long evolution cycles, as well as many patents and many patent owners. In this area, it is potentially dangerous to adopt the *ex-ante* disclosure of individual licence terms as it may lead to excessive cumulative royalties. In that case, it would be preferable and more useful to disclose unilaterally what IPR holders regard as the maximum commercially viable aggregate rate for a given standard, rather than merely disclosing each patent holders' individual rates. This approach is also known as "*ex-ante* plus," and is considered to be a more nuanced approach to classical *ex-ante*. Disclosure under the "*ex-ante* plus" model would be entirely unilateral and does not involve or imply any collusion whatsoever. It is no more than each patent owner articulating its own view of what a reasonable cumulative royalty would be. Actual royalties remain to be negotiated bilaterally in the normal way.

ECIS also believes that the wording used in paragraph 287 regarding joint negotiations or discussions of licensing terms being contrary to Article 101 (1) TFEU should be removed or revised. While ECIS and its members recognise that there may be cases where joint negotiations within an SSO may constitute price fixing of licensing terms violating Article 101 (1) TFEU, it also submits that the joint negotiation or discussion of licensing terms under certain circumstances may be pro-competitive and beneficial to SSO members and the users of a standard, as it may prevent users from being "locked in" to a specific standard, or suffer from inefficiencies caused by potential patent hold-up. Such negotiations should be analysed under a rule of reason test or under Article 101 (3) TFEU.

## V. Marking of conformity with standards

Finally and importantly, ECIS is very concerned about paragraph 305 of the draft, which it strongly urges the Commission to redraft. The current draft states that "[s]*tandardisation agreements that entrust certain bodies with the exclusive right to test compliance with the standard, or impose restrictions on marking of conformity with standards, unless imposed by regulatory provisions, go beyond the objective of achieving efficiencies and may not be indispensable to the attainment of these objectives*."

The wording of paragraph 305 as applied to IT standards may be interpreted to mean that a standards organization could not impose a series of conformity tests to ensure compliance with the standard, and require compliance with the tests in order to use marks associated with the standard. Such reasoning is fundamentally flawed. Customers who rely on a standard for purposes of interoperability, particularly one that has been marketed for this purpose, come to expect that, if they buy standardised technology bearing the mark, they can use it with other products that comply with the standard and that are equally interoperable. In order to achieve interoperability that works, and ultimately to offer customers the flexibility and choice they demand, IT standards may require a standardised set of tests that the implementation of the standard must pass in order to be deemed compatible and bear the marking representing such compatibility.

If such standardized testing and marking were to be prohibited, interoperability would not be assured, and consumers could be misled about the technology implementing the standard. The result would be that the objective of achieving efficiencies through the standard would not be achieved. That does not mean that conformity tests defined centrally by the standards body or an entity entrusted therewith should be *applied* exclusively by that standards body, or that the use of a conformity mark should be *required*. But the Draft Horizontal Guidelines should acknowledge that approaches that allow consumers to recognise standards compliant implementations through marks based on uniformly predefined criteria are efficiency-enhancing. Moreover, the Draft Horizontal Guidelines should acknowledge that it may be appropriate in certain cases to allocate compliance testing to a specific agency, for instance, where different entities had a chance to bid for the exclusive role, where the information used for the conformance testing is security-sensitive, where efficiencies are achieved, and provided of course that there is no conflict of interest. This should be subject to analysis under a rule of reason test or Article 101 (3) TFEU.

## VI. Conclusion

ECIS would like once again to thank the Commission for its hard work in putting together such a detailed and helpful guide on the rules governing ICT standardisation agreements and how such agreements should be treated under Article 101 (1) TFEU. The Draft Horizontal Guidelines are a huge step in the right direction towards reaping the positive benefits of standardisation in the ICT industry. ECIS submits these comments in an attempt to provide some constructive thoughts on how to improve the already useful Draft Horizontal Guidelines. We of course remain at your disposal to explain in further detail any of the issues described above.