

CPI Antitrust Chronicle

February 2011 (1)

Further Reflections on the Impact
of the EC Horizontal Cooperation
Guidelines on Intellectual
Property Rights and Innovation

Richard Taffet
Bingham McCutchen LLP

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I. INTRODUCTION

The European Commission has now issued its *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (the “Guidelines”).² The final version of Chapter 7 of the *Guidelines* reflects significant modifications from the draft released last year, and appear to reflect an attempt to address many comments submitted regarding the draft’s lack of balance in Chapter 7 between intellectual property and competition law rights and principles. Indeed, as I previously observed, the draft *Guidelines* might, in fact, have reflected an anti-IP bias that could be construed in ways that would diminish the rights of IP owners, create less certainty with respect to the lawful exercise and assertion of IP rights, and undermine the pro-competitive use of IPR specifically in the standards context, thus threatening to diminish the positive, innovation-enhancing potential of standardization.³

More specifically, as previously commented, while the draft *Guidelines* identified the potential for anticompetitive effect in connection with standardization, they failed to observe that as a general matter (i) the use of proprietary technology in standards is pro-competitive, and (ii) the effective enforcement of IP results generally in positive competitive effects. Furthermore, the draft *Guidelines* provided no context—or even definition—of the anticompetitive conduct identified—*i.e.*, “hold up” or “excessive pricing”—in the standards context, or acknowledged that competitive risks resulting from what may be claimed as “hold up” or “excessive pricing” are, in large measure, theoretical.

As a result, the draft *Guidelines* could have easily been interpreted as requiring a fundamental shift of existing legal standards and standardization processes, even though no systemic competitive problems in the standards arena actually exist. Moreover, and perhaps most troubling, the draft *Guidelines* risked interpretation as imposing prescriptive rules, rather than applying the type of competitive analysis necessary to properly evaluate the effect of conduct in the context of standardization and in relation to IPR for purposes of determining whether any unlawful competitive restriction has or would likely occur. As such, the draft *Guidelines* created the risk that they themselves would limit the pro-competitive nature of standardization, limit the

¹ Mr. Taffet is a partner with the law firm of Bingham McCutchen LLP.

² *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* C(2010) 9274/2, Chapter 7, hereafter “Guidelines.”

³ See Richard Taffet, *The Impact of the Draft EC Horizontal Guidelines on Intellectual Property Rights and Innovation*, 9(1)CPI ANTITRUST CHRON., (September 2010).

rights of IP holders (contrary to settled IP law), and overall diminish the ability of firms effectively to compete, especially in the fast moving world of information and communications technology.

As revised and reflected in the final Chapter 7, however, the *Guidelines* now, while still lacking coherence in some critical areas (*e.g.*, explaining meaningful standards underpinning the analysis of unilateral conduct in the IPR and standards contexts), have come a long way to expressly recognize the generally pro-competitive nature of standardization and IP, as well as the limited and discrete circumstances that may result in restrictive competitive effects in such contexts.

Equally important, it appears indisputable that the *Guidelines* make it clear that conduct, including in relation to standardization, must be analyzed for purposes of assessing its lawfulness under Article 101 of the Treaty based upon objective criteria that assess the actual competitive effects of the subject conduct. This is the case even for conduct that will not qualify for Chapter 7's safe harbor—there will be no presumption that non-safe harbor protected conduct is unlawful, and rather all conduct shall be considered based on its actual or likely competitive effects.

Thus, while the *Guidelines* will no doubt be the subject of ongoing discussion, and perhaps alternate interpretation, it should now be clear that they do **not** represent a “sea change” from existing law, if any change at all, and they should not be considered as an invitation to require any modification of current standardization processes as successfully pursued not only in Europe, but globally. This note touches on certain aspects of the *Guidelines* that support these conclusions.

II. THE GUIDELINES RECOGNIZE THE GENERALLY PRO-COMPETITIVE NATURE OF STANDARDIZATION AND IPR.

One of the more significant changes reflected in the issued *Guidelines*, as compared to the draft, is the Commission's express recognition that standardization and IPR-related conduct will generally be pro-competitive. This omission from the draft was the subject of a number of commenters, and the fact that the position is now expressly set forth affords tremendous comfort and greater certainty for those participating in standardization efforts, and for those who seek to contribute or use IPR in connection with such efforts.

The intent of the Commission to emphasize the generally pro-competitive nature of standardization and IPR-related conduct cannot be mistaken in light of the repeated commentary in this regard. For example:

- **Standardization agreements usually produce significant positive economic effects**, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. **Standards thus normally increase competition and lower output and sales costs, benefitting economies as a whole.** Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers). (Emphasis added.)⁴
- **Standardization agreements frequently give rise to significant efficiency gains.** Union wide standards may facilitate

⁴ Guidelines, ¶263.

market integration and allow companies to market their goods and services in all Member States, leading to increased consumer choice and decreasing prices. Standards which establish technical interoperability and compatibility often encourage competition on the merits between technologies from different companies and help prevent lock-in to one particular supplier. Furthermore, standards may reduce transaction costs for sellers and buyers. . . . **Standards also play an important role for innovation.** They can reduce the time it takes to bring a new technology to the market and facilitate innovation by allowing companies to build on top of agreed solutions. (Emphasis added.)⁵

- **Where standards facilitate technical interoperability and compatibility or competition between new and already existing products, services and processes, it can be presumed that the standard will benefit consumers.**” (Emphasis added.)⁶

The *Guidelines* also correct the omission from the draft *Guidelines* that a strong IP environment supports the pro-competitive result of advancing dynamic competition, and thus innovation. In this regard, “[i]ntellectual property laws and competition laws share the same objectives of promoting innovation and enhancing consumer welfare. IPR promotes dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. IPR are therefore in general procompetitive. . . .”⁷

Based on these provisions alone, the *Guidelines* can be understood to reflect the Commissions’ important reaffirmation that standards development activities, and the use of IPR in connection with such activities, should generally, if not presumptively, be considered pro-competitive, and therefore raise no concerns under EU competition law.

III. THE GUIDELINES RECOGNIZE LIMITED CIRCUMSTANCES THAT MAY GIVE RISE TO COMPETITIVELY RESTRICTIVE EFFECTS IN THE STANDARDS CONTEXT

The foregoing understanding is yet further reinforced by the refocusing of the *Guidelines* away from what could have been interpreted from the draft as an approach that would impose prescriptive rules for determining whether conduct is unlawful. Now, it seems clear that a full assessment of competitive effects is required and only in limited circumstances will standardization and IP-related conduct be anticompetitive. This understanding appears clear from a reading of the *Guidelines* as a whole and in light of existing applicable law, even though the *Guidelines* continue to make broad statements regarding the risk of anticompetitive effects arising from undefined concepts of “hold up” and “excessive pricing.”⁸ If it were otherwise, Chapter 7 of the *Guidelines* would lack any meaningful construction.

Thus, Chapter 7 itself provides a clear indication that anticompetitive effects will be found in only limited circumstances when standardization and IP-related conduct are involved. Specifically, Chapter 7 identifies the “specific circumstances” where standard setting conduct can give rise to restrictive effects on competition. The “specific circumstances” identified are where there is (i) a reduction in price competition; (ii) a foreclosure of innovative technologies; and (iii)

⁵ Guidelines, ¶308. *See also* ¶ 311, “standards creating compatibility on a horizontal level between different technology platforms are considered to be likely to give rise to efficiency gains.”

⁶ Guidelines, ¶321.

⁷ Guidelines, ¶269.

⁸ *See, e.g.*, ¶ 269.

the exclusion or discrimination against certain companies by preventing effective access to a standard.⁹ But, even in these circumstances, and assuming the conduct at issue is not a restriction by object, the *Guidelines* unambiguously provide that “[t]he assessment of *each* standardization agreement must take into account the likely effects of the standard on the markets concerned.”¹⁰

Of similar effect is the provision that standardization agreements “must be analyzed in their legal and economic context with regard to their actual and likely effect on competition.”¹¹ Indeed, “[i]n the absence of market power, a standardization agreement is not capable of producing restrictive effects on competition.”¹² Moreover, “even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis.”¹³

These express observations have significance. Most importantly, in contrast to how the draft *Guidelines* may have been interpreted, as issued the *Guidelines* leave little doubt that assessing standardization agreements, and IPR-related conduct in the standards context, is not a “bright line” exercise. Rather, there will be the need to assess actual competitive effects arising from any standard/IPR conduct before drawing any conclusion whether any restriction of competition exists. This will require case-by-case evaluations and will not permit presumptions of unlawfulness, with the exception of restrictions by object. In connection with the assessment of IPR-related conduct, the foregoing position is made express in the *Guidelines*.

Thus, otherwise ambiguous or overreaching statements in the *Guidelines* regarding the potential for anticompetitive conduct must be read consistent with these overall limiting principles. This is true, for example, of the *Guidelines* statement that a participant in a standard setting body owning essential IPR:

could, in the specific context of standard-setting, also acquire control over the use of the standard. . . [and w]hen the standard constitutes a barrier to entry, the company could thereby control the product or service market to which the standard relates. This in turn could allow companies to behave in anti-competitive ways, for example by ‘holding up’ users after the adoption of the standard either by refusing to license the necessary IPR or by extracting excess rents by way of excessive royalty fees thereby preventing effective access to the standard.¹⁴

On its face this statement is overly dependent for its potential conclusion on a myriad of contingencies, and if given prescriptive effect it would be contrary to the overall focus of the *Guidelines*, which requires a full assessment of competitive effects.

In these circumstances, a fair and completed reading of the *Guidelines* suggests that before any conclusion can be reached that anticompetitive effects will result from a patent holder’s exercise of its IPR in connection with standardization, it will be necessary, as commented, to show that as a result of the ownership of IPR the holder acquired market power. If no market

⁹ *Guidelines*, ¶294.

¹⁰ *Guidelines*, ¶202.

¹¹ *Guidelines*, ¶277.

¹² *Guidelines*, ¶277.

¹³ *Guidelines*, ¶269.

¹⁴ *Id.*

power can be shown, then no conclusion of anticompetitive “hold up” or “excessive pricing” could be sustained. Moreover, it would be incorrect to conclude that an actionable competition law claim would exist even if ownership of standards-essential IPR were determined to confer market power on the IPR holder, specifically where such ownership was lawfully obtained and the IPR owner engaged in no deceptive or otherwise exclusionary conduct beyond that permitted by the IPR laws. This would be the case even if the IPR owner sought to have its IPR included in a standard, regardless of the “price” sought for a license thereto.

This is an important point for understanding the *Guidelines*’ reference to potential “excess pricing” claims based on what might be challenged as an excessive royalty demand. The *Guidelines* themselves provide no effective guidance how such a claim would be supported in the context of IPR licensing. The *Guidelines* do state that a “high royalty fee can only be qualified as excessive if the conditions for an abuse of a dominant position as set out in Article 102 of the Treaty and the case-law of the Court of Justice of the European Union are fulfilled,”¹⁵ but no explanation is given to how a standard applied to the pricing of bananas or other tangible commodities, can be reasonably applied to intangible property such as patent rights.

Moreover, even assuming the excessive pricing standards applicable in the Article 102 context should be applied in the context of Article 101, which is subject to debate, the *Guidelines* remain silent on, but must be understood in the context of, the extremely narrow and limited circumstances where an excessive pricing theory has been pursued by the Commission. As explained by then members of DG Competition’s Chief Economic Team, the Commission historically has been very cautious in bringing excessive pricing cases, and that such cases were generally decided in the early years of antitrust enforcement in the EU based on idiosyncratic policy considerations relating to the Single Market of the EU.¹⁶ And, as observed by Messrs. Neven & de la Mano:

Absent these broader policy considerations [*e.g.*, concerning the EU Single Market] . . . a competition authority has good economic reasons not to encroach on the rights of a dominant firm to charge whatever prices or royalties the market would bear, provided the acquisition of such dominance was legitimate—for example, through R&D leading to a patent.

Indeed, both intellectual property protection and cooperative research and development can be seen as restricting competition but may be required for the innovation to arise in the first place. More generally, high prices tend to be self-correcting as they attract market entry and encourage investment and the reallocation of resources to those activities and market that are of the greatest value for consumers.¹⁷

Thus, a fair reading of the *Guidelines* in connection with issues of “hold up” and “excessive pricing” suggests that the circumstances giving rise to a violation of Article 102 should be quite limited and, before any conclusion of a violation can be made, a full assessment of competitive effects will be necessary. This is what Chapter 7 itself proclaims and if this is, in fact, the case, then the *Guidelines* do the laudable service of making it clear that EC competition law is premised on objective criteria and rigorous competitive analysis.

¹⁵ Cited in Case 27/76, *United Brands*, [1978] ECR 207).

¹⁶ See D. NEVEN & M. DE LA MANO, *ECONOMICS AT DG COMPETITION*, 2009-2010, (Nov. 16, 2010).

¹⁷ *Id.* at § 4.1.

Understanding that the *Guidelines*' discussion of fair, reasonably, and non-discriminatory ("FRAND") Commitments¹⁸ is likewise premised on the same principles, also affords clarity to provisions that might otherwise be interpreted as creating legal duties and policy positions without a foundation in competition law. For example, "FRAND commitments can 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 or by charging discriminatory royalty fees."¹⁹

But, difficulty of implementation, standing alone, is not a meaningful competition law principle. Nor is necessarily a patent owner's decision not to license after making a FRAND commitment. That may be a breach of some contract, but just an IPR holder's refusal to license after saying it would is insufficient to establish an anticompetitive effect. The *Guidelines*' assessments required by well-established EU case law, such as standardization agreements "must be analyzed in their legal and economic context with regard to their actual and likely effect on competition"²⁰ and "[t]he assessment of each standardization agreement must take into account the likely effects of the standard on the markets concerned"²¹ make this clear.

The same is true even to a greater extent where a complaint is made that an IPR holder's demand for a certain level of royalties is "too high." As Messrs. Neven & de la Mano observe, simply charging a high price is not necessarily anticompetitive conduct, and there remains great uncertainty regarding how an excessive pricing theory can be applied in the IPR and standardization contexts. The *Guidelines* comment that "the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of IPR,"²² but the *Guidelines* further acknowledge the difficulty of assessing the "reasonableness" of a royalty or the value of IPR.²³

Moreover, even though the *Guidelines* concede that they do not seek to provide an exhaustive list of methods to assess whether royalty fees are excessive,²⁴ the possible methods suggested lack recognition or acceptance as appropriate for such purposes. Thus, absent an understanding of the *Guidelines*' FRAND discussion in the overall analytical context explained by the *Guidelines* involving an assessment of actual or likely competitive effects, the *Guidelines* present no guidance and promote speculative and subjective evaluations of conduct that are particularly unsuited to a legitimate, well-grounded competition law analysis.

IV. CONCLUSION

As compared to the draft of the *Guidelines* made available in mid-2010, the final version of Chapter 7 reflects important changes that allow for a clearer understanding that a full assessment of competitive effects, including the dynamic competition-enhancing nature of IPR, will be necessary for determining whether standardization and IPR-related conduct will run afoul of

¹⁸ *Guidelines*, ¶¶ 287-291.

¹⁹ *Guidelines*, ¶287.

²⁰ *Guidelines*, ¶277.

²¹ *Guidelines*, ¶292.

²² *Guidelines* ¶289.

²³ *See, e.g.*, ¶ 289, "cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular patent."

²⁴ *Guidelines*, ¶290.

Article 101 of the Treaty. As revised, the *Guidelines* further clarify that significant limitations exist for establishing anticompetitive effects in this context, especially because of the generally pro-competitive nature of standardization and IPR.

Understood as such, the *Guidelines* may not establish new legal principles, nor could they. They can, however, serve the important role of providing guidance—as distinct from establishing prescriptive rules—by reaffirming the rigorous exercise that will be required in addressing complex competition issues such as those that may arise, albeit infrequently and only under limited circumstances, in connection with standardization and IPR.