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Guidelines issued by the European Commission can provide an important complement to the modernization of Europe's competition regime. Instituted by Regulation 1/2003, modernization did away with the system of prior notification to the European Commission competition authority, making undertakings themselves responsible for assessing the legality of their business practices. Guidelines are thus increasingly important, as business practices become more complex and as the law requires an effects-based, rather than *per se*, approach. Guidelines also provide guidance to national competition regimes and courts, which may apply European competition law under the modernization regime.

The function of guidelines is therefore not to create new law, but to provide undertakings with a level of clarity and legal certainty as to what the existing law prescribes. It is also that true guidelines must remain at a level of generality, given that they cannot cover all permutations. In this light and due to their legal nature, guidelines are not capable of having *direct* legal effects on undertakings (save where they create legitimate expectations). This background is important is assessing the recently adopted Guidelines on Horizontal Cooperation Agreements[2] and notably Chapter 7 of those Guidelines which addresses Standardization Agreements.

The following paper makes some observations on this chapter of the new Guidelines.

First, the fact that the Guidelines are not intended to be prescriptive is attested by the many public comments from the Commission which continually stressed the wish to remain business-model neutral and not to prescribe particular models for standard setting organizations ("SSOs").[3] This is critical, given that Chapter 7 addresses standardization activities across all sectors of the economy, and includes formal and informal standardization activities. SSOs and their members are free to adopt rules best suited to their objectives, so long as these conform to the law.

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[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*, for example, Madero Villarejo & Banasevic, "[W]e do not believe it is the role of an antitrust regulator to prescribe a specific type of scheme to standards bodies. While it is of course imperative that a standards body's rules comply with competition law, industry knows itself best, and therefore should responsibly draw up the rules that are most appropriate to its needs," C. Madero Villarejo & N. Bansevic, *Standards and Market Power*, GLOBAL COMPETITION POL'Y, at 6 (May 2008). Officials in the US Department of Justice have made consistent statements on the matter.

Second, the Guidelines do not create new law. Yet drafting the Guidelines will have been an onerous task, as there is little case law related to standardization activities to draw from. Indeed, the lack of case law indicates that, in general, SSOs have evolved rules that by-and-large ensure pro-competitive standardization activities. It is also indicative of: an absence of any endemic problem to date, as well as the Commission's desire not to be drawn into ordinary commercial disputes and the Commission's respect for incentive schemes to innovate and share innovations, as engendered by EU member states (and other jurisdictions around the world). This is especially so given that complex standardization often creates an inter-dependent network, where regulatory intervention at one level of the value-chain may well negatively affect an ecosystem that brings much consumer welfare.

It should not be a surprise, therefore, that in setting out the requirements that the Commission deem important to ensure that SSO have rules that are not anticompetitive, the Guidelines reflect the existing rules of many formal European SSOs. In fact, most formal SSOs in the technology sector, such as the European Telecommunications Standards Institute ("ETSI"), will effectively see nothing new in the Guidelines. Given this, and the fact that the Commission does not seek to proscribe rules, such SSOs should not feel compelled to modify procedures and policies that have been working well for many years.

In the case of ETSI, this is especially true given the fact that the Commission has had ongoing oversight of ETSI's functioning, and has provided guidance to ETSI on its policies and procedures over many years. For example, in 1995, under the old notification regime, the Commission sent ETSI a "comfort letter" in respect of its Interim Intellectual Property Rights Policy, taking the view that the policy did not, in principle, infringe Article 101(1) of the Treaty. More interestingly, in 2006, the Commission expressed concern over a proposal being discussed within ETSI that would have entailed changes to its IPR policy relating to setting royalty levels before the final agreement on a standard. The Commission noted that an *ex ante* model, which capped the total royalties available for all essential patents before a standard was agreed, was a problem given that such a scheme negated the potential for price competition and would risk undermining prospective licensors' incentives for innovation. The proposal to adopt ex ante royalty caps was, of course, rejected by ETSI.

The new Guidelines address standards that contain technology protected by IPR, which has been the focus of much interest. The Commission believed such guidance would be useful partly in view of the theories about "patent hold-up" that have been the subject of recent debate (as well as a number of antitrust complaints, although it is notable that none have resulted in prohibition decisions). Importantly, the Guidelines emphasize the generally pro-competitive nature of standardization and of the use of IPR in standards. The Guidelines also emphasize the availability of contract remedies to address refusals of owners of essential patents, should these occur, to comply with their fair, reasonable, and non-discriminatory ("FRAND") commitments. Further, the Commission has historically been reluctant to pursue cases that allege "excessive pricing" given the challenges in resolving such allegations, which are greatly magnified in cases involving intangibles such as IPR.[4] Consistent with the foregoing, by emphasizing the generally

[4] *See,* for example, Neven & de la Mano:

> It can be argued that absent exclusionary behavior, monopolistic rents should be of no concern to antitrust regulators or courts. Indeed the Commission and the Courts have explicitly stated that it is legal to hold a dominant or monopoly position. A profit maximizing firm in such position can be

pro-competitive nature of standardization and the use of IPR in standards and therefore by recognizing the incentive scheme created by patent law, the Guidelines appear to recognize that competition law intervention may be appropriate only at the margins of standards activities. This is an important conclusion of the Guidelines.

The standardization agreements chapter of the Guidelines is complex and, given the evolution of the various drafts, shows that the drafters sought to tread a fine line between the spectrum of comments the Commission received. However, as guidelines need to be fairly general, and as there is very limited case-law in the field of standards involving IPR, further guidance should be sought from various sources, including the general case-law of the European Court of Justice, recent statements from the Commission, and from senior officials of the Commission's Directorate General for Competition, as well as from past guidance provided to ETSI. These other sources may contribute to a better understanding of some of the more controversial points that the Commission was confronted with when developing the Guidelines. These points include: the issues of buyer cartels; the nature of dominance in a standards context; the limits of antitrust intervention in an IPR context; and the nature of commitments to license essential IPR on FRAND terms.

A particular element of standardization in the telecommunications sector is that SSO members include both companies that contribute technology solutions, as well as those producing goods and implementing the resulting standards. This creates a complex matrix involving players that are horizontal competitors, have vertical relationships, or both. This is important given that, in complex technologies at least, implementers of the standards often determine the selection of the technologies making up a standard. While the standardization chapter of the Guidelines does not directly address the monopsony issue, it seems pretty clear from past advice given to ETSI by the Commission (already noted above), that buyer power in the SSO context is an area that the Commission will continue to scrutinize, especially as collective price negotiations will increase the likelihood that technology adopters coordinate in order to extract excessively favorable terms from IPR holders. Such an approach would be entirely consistent with the Guidelines' identification, in paragraph 264, of the potential for restrictive effects on competition where standards-related conduct results in a reduction of price competition.[5] This, of course, would relate to conduct on both the seller and buyer sides.

Another controversial element of the Draft Guidelines was the initial call by some for the Guidelines dealing with Article 101 issues to also provide guidance on unilateral effects theories under Article 102. This did not occur in the final Guidelines, as detailed discussion of Article 102 was perhaps inappropriate for guidelines on horizontal cooperation agreements, given the level of abstraction that such an analysis would require. However, there is food for thought in statements made by senior Commission officials from DG Competition on the matter. For example, back in 2008, Cecilio Madero Villarejo & Nicholas Banasevic[6] viewed that inclusion of essential IPR in a standard does not, in itself, confer market power. This is consistent with the express wording of the Guidelines and could be the case, for example, in situations where a

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> expected to charge higher than competitive prices. It would appear inconsistent to allow substantial market power but to prohibit its exercise. Not surprisingly, the Commission has been cautious in bringing excessive pricing cases."

Damien Neven & Miguel de la Mano, *Economics at DG Competition, 2009–2010*, REV. IND. ORGAN, at 4.1 (Nov 2010).

[5] Guidelines, ¶ 264.

[6] *See* Madero Villarejo & Banasevic, *supra* note 2.

standard is never commercially deployed or where competing standards exist. Madero Villarejo & Banasevic also made the distinction between any market power that may have been achieved through competing rival technology solutions out of the standard and any market power achieved due to the unique nature of a technology, as "[i]n such a scenario, the price that the patent holder can charge is the same *ex ante* and *ex post*, and hence there is no incremental market power conferred by the standard."[7] Indeed, this explains why the Guidelines expressly state that the question of market power can only be assessed on a case-by-case basis, given that there is no presumption that holding essential IPR equates to market power.[8]

The unilateral conduct issue is raised again in the context of the commitment to license essential IPR on FRAND terms, as such commitments can in particular "prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable licensing terms."[9] However, unilateral action will only be considered anticompetitive once there has been a finding of market power. This is also an important issue because as the Guidelines make clear, "in the absence of market power, a standardization agreement is not capable of producing restrictive effects on competition."[10]

Equally, if not more important, the patent laws clearly recognize that IPR may in certain circumstances confer market power and this possibility is an essential part of the incentive scheme created by the patent system. Thus, even if the patent owner is found to have market power, the relevant European Court of Justice jurisprudence is clear; only in "exceptional circumstances" may the exercise of IPR give rise to an abusive conduct.[11] The Court's jurisprudence sets out that a dominant firm does not abuse its dominant position merely by refusing to license IPR for a reasonable royalty unless three cumulative conditions are satisfied: that such refusal (i) prevents the emergence of a new product for which there is potential consumer demand, (ii) is unjustified, and (iii) is such as to exclude any competition on a secondary market.[12] It should be also clear that standard-setting itself is not an "exceptional circumstance." Not only would such a proposition find no support in EU competition law but it would also essentially amount to a compulsory licensing requirement. The Guidelines must be read and applied with this case law firmly in mind.

The recognition in the Guidelines that the FRAND regime underpins many SSO IPR policies is welcome. That said, the Guidelines focus on only one element of FRAND: "FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions."[13] This is only part of the story, as the FRAND commitment also benefits

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[7] *Id.*, pp 3-4.

[8] Guidelines, ¶269.

[9] Guidelines, ¶287.

[10] Guidelines, ¶277.

[11] The case law is usefully summarized in the European Commission's answers to a Questionnaire for the International Competition Network's Unilateral Conduct Working Group (November 4, 2009) (http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20refusals/europeancommission.pdf).

[12] *See* e.g. Case C-418/01 *IMS Health* [2004] ECR 1-5039, ¶¶ 37 et seq.; *see also* Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission (Magill)* [1995] ECR 1-743, ¶¶ 49 and 50. See also Case 238/87 *Volvo v Veng* [1988] ECR 6211, ¶ 8.

[13] Guidelines, ¶287.

the IPR owner. As was highlighted in an article published shortly before the adoption of the Guidelines by the then DG Competition Chief Economist and the Deputy-Chief Economist:

> a potential licensee must be viewed as having an equal obligation to engage in good faith negotiations and not abuse a FRAND commitment to gain unfair advantage or simply infringe a licensor's IPR. This reflects the view that the bargaining advantage is not entirely shifted to either party ex-post.[14]

This is obvious, as the FRAND commitment must incentivize technology companies to make contributions to standardization efforts and enter into FRAND commitments.

So the FRAND commitment can only serve its purposes and effectively be discharged if standard users comply with certain converse obligations. This is one reason why contract law and process may be more suited to the resolution of FRAND disputes than competition law. The Guidelines expressly note the availability of contract law to resolve FRAND disputes; "However, it should be emphasised that nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts."[15]

What must be clear is that the Guidelines should be interpreted in a way that will incentivize innovators to contribute their technologies to standardization efforts and to share their inventions, as well as incentivizing innovators and investors to continue to invest in risky research and development. Indeed, the Technology Transfer Guidelines ("TTG")[16] cited in Chapter 7 of the Guidelines is an important adjunct to understanding this imperative. The TTG state that: IPRs promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes; the creation of IPRs often entails substantial investment and that it is often a risky endeavor; innovators must not be unduly restricted in the exploitation of IPRs that turn out to be valuable and should be free to seek compensation for successful projects that is sufficient to maintain investment incentives, taking failed projects into account; and there is no presumption that IPRs and licensing, as such, give rise to competition concerns. Indeed, licensing is pro-competitive as it leads to dissemination of technology and promotes innovation both up- and down-stream, while incentivizing investment in competing technologies.

Thus interpreted, the Guidelines are consistent with the European Union's industrial policy imperatives,[17] which are critical for the European Union to achieve a new period of growth and dynamism and within which competition policy plays a fundamental role.[18]

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[14] *See* Neven & de la Mano, *supra* note 3.

[15] Guidelines, ¶291.

[16] Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, Official Journal C101/2, 27.4.2004.

[17] Communication from the Commission, *Europe 2020 A Strategy for a smart, sustainable and inclusive growth*, COM (2010) 2020; and e.g. Communication from the Commission, *Europe 2020 Flagship Initiative; Innovation Union*, COM (2010) 546.

[18] *See* e.g. speech by Vice-President Joaquín Almunia, EU Competition Commissioner, *EU Antitrust policy: the road ahead* at the International Forum on EU Competition Law on 9 March 2010, Brussels, Speech/ 10/81.