

A good commercial lawyer sees beyond the law



Legal and IP trends in standardisation

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Two current policy developments at the EU level

- EU Commission is modernising its ICT standardisation policy
- EU Commission is updating its competition law guidelines on cooperation in standard-setting
- These parallel activities raise interesting questions regarding appropriate requirements for:
 - openness in the standardisation process
 - availability of standards on RF or FRAND terms
- Increasingly relevant considering the convergence between IT and telecoms; integration of hardware and software

EU ICT standardisation policy

- Current policy built on formal procedures and formal SSOs
 - Three recognised ESOs: CEN, CENELEC and ETSI
 - Official national standards bodies and internationally recognised bodies (such as the ISO, IEC and ITU)
- New policy should involve "non-formal" SSOs
 - Majority of ICT standards emerge from such bodies
 - Notable examples include W3C, IEEE, IETF, OASIS
- Proposed "attributes" for SSOs and standards to be recognised by the EU
 - Openness, consensus, balance, transparency
 - Licensing on RF or FRAND terms to ensure availability
- Relevant industry differences

EU competition policy

- *”[P]rivate standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits...”*
Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 506-507 (1988)
- Standardisation lead to significant consumer benefits
 - Interoperability, compatibility, dissemination of technology, quality, substitutability
- May limit inter-technology competition and affect innovation
 - Foreclosure effects at the technology level
 - Foreclosure effects at the implementation level

Draft new guidelines on horizontal cooperation under Article 101 TFEU

- Safe harbour approach
 - Unrestricted participation
 - Transparent and non-discriminatory procedures
 - No bias for or against royalty-free standards
 - Prevent misuse through hold-up and excessive royalties
- Expansion on IP issues in light of recent experiences (Rambus, Qualcomm et al)
 - The role of patent disclosure, FRAND commitments and *ex ante* declarations
 - Application of Article 102 TFEU against abuses of market power
- Limited framework for analysing restrictions of competition under 101(1)
 - Particularly relevant for smaller fora and consortia
 - X/Open case (1987)
- Emphasis on efficiency defence under 101(3)

Discussion points

- Distinguish industrial policy and competition policy
- Dynamics of convergence and integration
 - formal and "non-formal" SSOs
 - combination of FRAND and RF approaches

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