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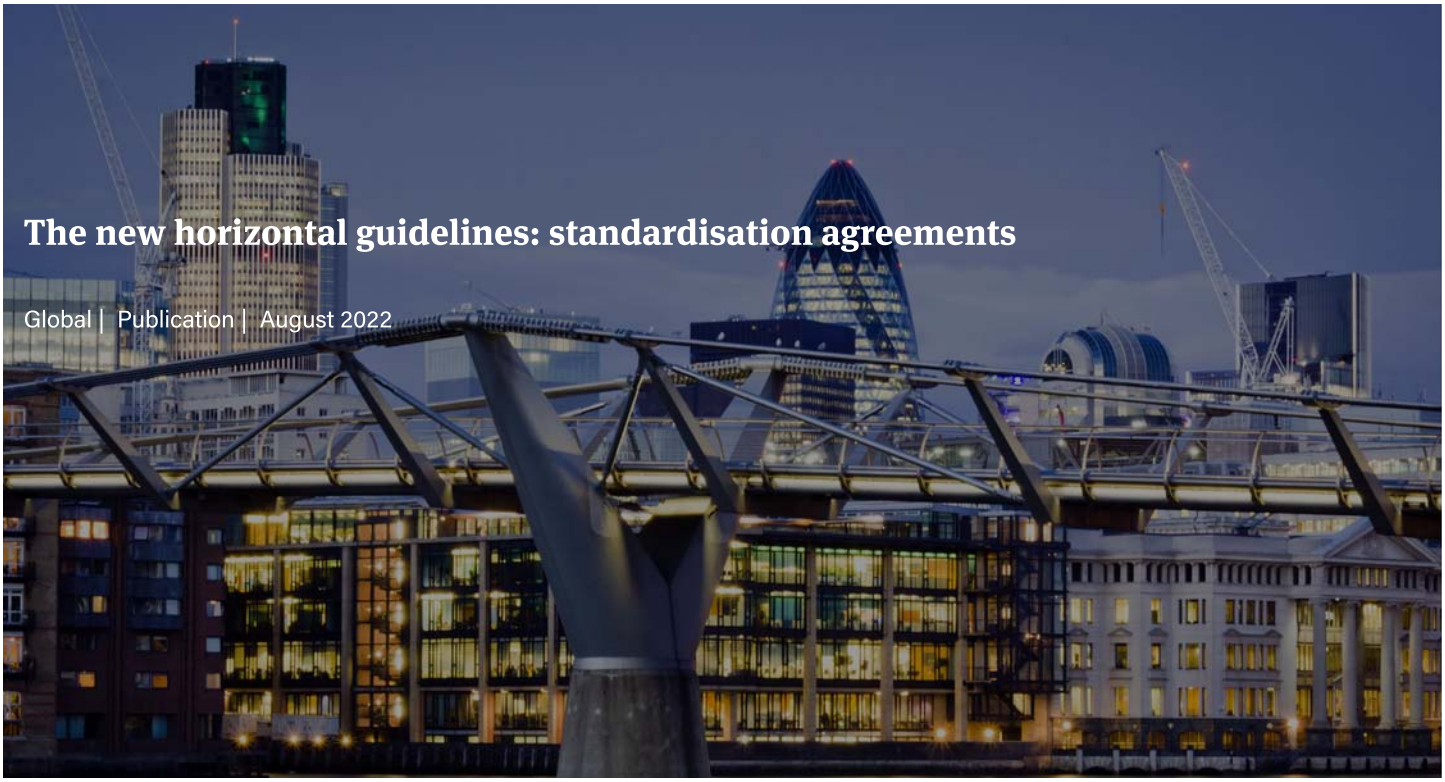

The new horizontal guidelines: standardisation agreements

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On 1 March 2022, the European Commission ("**EC**") published for consultation two draft revised horizontal block exemption regulations ("**HBERs**") on research and development ("**R&D**") and specialisation agreements, as well as draft revised guidelines on horizontal cooperation ("the **Guidelines**"). The updated EC regulations and Guidelines are expected to enter into force on 1 January 2023.

The section on standardisation agreements has been thoroughly reworked by the EC to address a number of identified shortcomings. The draft Guidelines introduce greater flexibility in the effects analysis by allowing, under certain circumstances, a more limited participation in the development of a standard as well as providing additional guidance for conducting a FRAND assessment for licensee fees.

A. Main competition concerns and restrictive effects on competition

Standardisation agreements may give rise to restrictive effects on competition when the agreement involves competitors. When it comes to intellectual property rights ("**IPRs**"), the Guidelines identify three main groups of participants with different interests: upstream-only participants that develop and market technologies, with licensing revenue as a primary source of income and therefore an incentive to maximise royalties; downstream-only participants that manufacture products or offer services, for whom royalties represent a cost and therefore an incentive to minimize them; and integrated participants which both develop technology and sell products. The last category has mixed incentives as they could claim royalties through the licensing of their IPR but they may also have to pay royalties to other undertakings holding essential IPR. In addition to these three categories, the Guidelines note that undertakings may value their IPR through methods other than royalties. In practice, most undertakings use a mix of the three business models mentioned.

Standardisation agreements which do not restrict competition by object must be analysed by looking at their legal and economic context to determine their effects on competition. The draft text specifies certain factors that should be taken into account in this analysis, including the nature of the goods or services affected and the structure and functioning of the market(s) in question. In the absence of market power, a standardisation agreement will not be anti-competitive.

B. FRAND commitments and evaluation of the FRAND character of licensee fees

The draft Guidelines introduce additional elements for conducting a FRAND assessment for licensee fees. It is now explicitly mentioned that FRAND can also cover royalty-free licensing. In the case of a dispute, the assessment of whether fees charged for access to IPR in the standard development context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the underlying IPR. This can be based on the present value added of the covered IPR and should not take into account the market success of the products, which is unrelated to the patented technology.

Various methods are available for the assessment of the economic value and in practice more than one method is used to account for deficiencies of a particular method and to cross-check the results. The draft text notes that it may be possible to compare the license fees charged for the relevant patents before the industry has developed the standard (ex ante) with the value/royalty of the next best available alternative; or with the value/royalty charged after the industry has been locked in[1] (ex post). The Guidelines also provide other methods to determine the FRAND character:

- An independent expert assessment for the objective centrality and essentiality of the relevant IPR to the standard at issue;
- In the context of a specific standard development process, a reference to ex ante disclosures of licensing terms, including the individual or aggregate royalties for relevant IPR;
- Comparison of the licensing terms of the IPR holders with other implementers of the same standard;
- The royalty rates charged for the same IPR in other comparable standards;
- Determining, first, an appropriate overall value for all relevant IPR and, second, the portion attributable to a particular IPR holder.

C. Good faith disclosure

The draft text notes that good faith disclosure by participants of essential IPR (for the implementation of a standard) should be a requirement of any IPR policy. Such disclosure should include the patent or patent application number.

If this information is not yet publically available, then it is sufficient to declare that the participant is likely to have IPR claims over a particular technology without identifying specific IPR claims or applications. This type of disclosure is now defined as a "blanket disclosure." A blanket disclosure is an exception, and a less effective way for the industry to make an informed choice of technology and to ensure effective access to the standard. The Guidelines encourage participants to update their disclosure when a standard is adopted, notably if there are any changes that may impact the essentiality or the validity of participants' IPRs.

The assessment of whether a standardisation agreement restricts competition will focus notably on access to the standard. If the IPR disclosure model differs from the methods described above, a case-by-case assessment is required on whether the disclosure model guarantees effective access to the standard. The EC notes that a disclosure model which discloses information regarding the characterises and value-added of each IPR to a standard will not, in principle, restrict competition.

D. Open vs restricted participation

Open participation in the standard development process will lower the risks of a likely restrictive effect on competition. Nonetheless, the draft Guidelines explain that, in certain circumstances, restricting participation may not lead restrictive effects on competition. The following examples are provided:

- if there is competition between several standards and standard development organisations;
- if in the absence of a restriction on the participants it would be impossible or unlikely to achieve adoption of the standard; or
- if the restriction on the participants is limited in time and with a view to progressing quickly (for example at the start of the standardisation effort) and as long as at major milestones all competitors have an opportunity to get involved in order to continue the development of the standard.

Furthermore, the potential negative effects of restricted participation might be removed or lessened by ensuring that stakeholders are kept informed and consulted on the work in progress, including through collective representation of stakeholders (e.g. consumers). Generally, the more transparent the procedure and the more stakeholders can influence the process leading to the selection of the standard, the more likely it is that the adopted standard will take into account the interest of all stakeholders.

Although most of the more official standard setting organisations will already meet most of its requirements, the new guidance will significantly enhance legal certainty for more ad hoc standardisation initiatives between industry participants.

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