

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

STANDARD SETTING

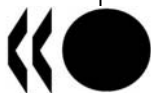
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The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 June 2010.

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1. Overview

1. The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its Roundtable on Standard Setting. The roundtable discussion on standard setting to be held by Working Party 2 of the OECD Competition Committee on June 14 is of very significant importance to those involved in standard-setting processes, such as innovators, manufacturers and other participants, in addition to consumers. The interface between competition enforcement and standard setting and implementation is complex and, while competition enforcement in some narrow and clearly defined instances may be necessary, the risk of incorrect conclusions and unwarranted policy outcomes in this area is high.

2. The work of the OECD in this area will have a substantial influence on the course taken by national competition enforcement agencies and other government bodies. The report of the roundtable will be cited and possibly relied on in establishing regulatory principles for the way standard setting organisations operate. This is particularly important given the ongoing discussions on antitrust guidance in this and related areas being undertaken in a number of jurisdictions, such as Europe, South Korea and China.

3. While competition law should continue to deter and provide effective remedies for improper exclusionary conduct, regardless of the setting in which that conduct occurs, including in the area of standard setting, it is critically important that the Committee's work should not endorse or support proposals in the name of competition law that operate effectively as an unbounded and uncertain qualification to intellectual property rights and thereby stifle the very innovation incentives that intellectual property laws (and indeed antitrust laws) were designed to create, stimulate and protect. Competition law should only encroach upon legitimate intellectual property rights in exceptional circumstances. The fact that intellectual property rights are invoked when the underlying technology is incorporated into a standard does not of itself constitute such an exceptional circumstance so as to justify interference with the exercise of intellectual property rights.

4. Today, there are literally tens of thousands of standards approved as national or international standards. Yet the number of disputes that result in antitrust litigation is very small. In fact, over the past decades the private standards process has operated effectively in the vast majority of cases enhancing competition, generating significant efficiency savings and promoting the development of markets and the expansion of technology. Despite the fact that standard implementers (as opposed to innovators and consumers) sometimes assert that conduct of IP holders in the framework of standard-setting organisations has raised anticompetitive concern, actual, successful regulatory challenges to those practices are rare and are based on unusual fact situations where abuse is established, rather than theorized.

5. The fact that the vast majority of standard-setting activities do not raise any competitive concern, is in marked contrast statement in the Call for Contributions and the Background Note (DAF/COMP/WP2(2010)4) that "Standard Setting is particularly prone to anti-competitive behaviour." BIAC does not believe that such statements are supported by facts. In addition, BIAC feels that the background documents lean too heavily towards the interests of standard users, i.e. implementers, possibly thereby undervaluing the interests of inventors and firms investing in innovation.

6. As a general matter, BIAC believes that government intervention in standard setting processes brings with it a high risk of chilling innovation, discriminating against specific business models and undermining the effectiveness of the standardisation process itself. As a result, BIAC believes such intervention is only warranted in the exceptional case and only under narrow and clearly defined circumstances.

2. The practice of standard setting and standard-setting organisations: general observations

7. Standardisation agreements have as their objective the definition of technical or quality requirements with which products, production processes, services or methods may comply. Standards developed within standard-setting organisations (SSOs) can cover multiple issues, such as connectivity, durability and the different grades and sizes of a particular product. For instance, standards may be developed for the safety features of motor vehicle components, or the technical specifications for a new generation of optical recording and play-back consumer electronics products. Within the information technology sector a myriad of standards have been developed to enable interconnectivity and interoperability of one product or component with another. From the standpoint of consumers and other users, those standards are extremely important because they allow combinations of products from different manufacturers to be formed creating expanded functionality and customised systems. For instance, without standards, only hardware and software from the same company could be used together.

8. Standards may be developed in a variety of ways. First, specific single-firm standards may over time evolve into de-facto industry standards. For instance, Adobe is known for having developed the Portable Document Format (PDF), which became a de facto standard (and is now a de jure standard known as ISO -32000-1). Second, standards may be developed by national or supranational governmental organisations, such as the American National Standards Institute (ANSI), or the International Organization for Standardization (ISO). Third, companies that are active in the same or related technology fields may collaborate, often with users, academics and other interested parties, in the development of standards by forming a dedicated, ad-hoc standards organisation. And fourth, standards may be developed in formal standards bodies, such as the European Telecommunications Standards Institute (ETSI), or the Joint Electron Devices Engineering Council (JEDEC). Whether standards are developed within an ad-hoc organisation, or under the auspices of a formal SSO, does not fundamentally alter the analysis of those activities under competition law. Indeed, in both cases it is the conduct of the participating companies, as well as the rules of conduct of the SSO (whether it is a longstanding forum for standards development or an ad-hoc organisation) that are the most relevant parameters for competition law analysis.

9. It is important to stress that standards are generally developed because the participating companies believe that efficiencies will be achieved that will enhance market demand for the standardised and related products and thereby increase consumer welfare. While cooperation in standard setting activities may in very limited circumstances give rise to anticompetitive effects, or serve as a shield for anticompetitive arrangements, the vast majority of these activities are embarked upon to speed up innovation, enable technological interoperability, and develop standardised product attributes and functions that will meet consumer demand and enhance overall market output. One current example of a relatively new industry in which emerging standards appear particularly important for further demand growth is the market for solar photovoltaics (PV), i.e. solar panel equipment.¹ BIAC notes that this efficiency-enhancing function of SSOs is an important starting point for antitrust analysis of standard-setting activities, but is, unfortunately, often overlooked or not properly credited in the analysis of net competitive effects.

10. As a related point, standard-setting activities tend to be looked at from an *ex-post* perspective. Obviously then, the analysis then tends to be restricted to standards that have been successfully developed and implemented, that have gained market acceptance and that have, in addition, become “successful.” A proper analysis must also encompass, however, the *ex-ante* incentives of the parties to invest significant and speculative resources to develop and support the standard and the actual and potential competition that the standard – and, as a corollary, the standard-compliant product- faced at the time the standard has been developed and launched.

¹ See, SEMI, “Photovoltaics: An Exploding Market Urgently Needs Industry Standards,” available at <http://www.semi.org/en/P039751>.

11. The preceding point is closely related to another feature of standard setting: numerous incipient standards simply fail once it becomes evident that there is no market demand for the standardized products.² For other standards, the test of market acceptance can occupy a prolonged period of uncertainty. One example is Digital Audio Broadcasting (DAB), a standard for transmitting and receiving digital radio signals that for many years did not seem to gain acceptance from industry participants and only became a relative success some 10 years after the specifications had been laid down in a standard. And more importantly, in most markets standard-setting initiatives compete, either potentially or actually, with other initiatives to establish the technical specifications of new products. In fact, this is a common phenomenon in many areas; technologies may compete for inclusion in a standard that is being developed and standards may compete for market acceptance. In some instances, competition between standards may take the form of a “standards war”. In fact, there are many examples of such standards wars in which different firms (after having made significant investments in the research and developments of particular technologies) compete by offering standardized, but mutually incompatible products based on such technologies, such as VHS and Beta VCRs³. A more recent example is the “battle” between the High-Definition DVD (“HD DVD”) and Blu-ray standards for a successor to DVD, which was eventually “won” by Blu-ray when the content industry (“Hollywood”) decided to support Blu-ray.⁴

12. During the standard-setting process, the participating companies typically define the technical requirements and desired functionalities of the new product. These discussions generally have a highly technical character and may involve comparing the potential advantages of multiple possible approaches to a particular technical problem. For instance, the companies participating in standard-setting discussions may conclude that there are various technical solutions to avoid malfunction of a specific electronic apparatus due to overheating. After an in-depth review of those alternatives, they may then decide that option A best meets the requirements, optimizes the chances of market acceptance, and should thus be included in the standard. It is therefore important to stress that discussions on technical specifications are generally driven by the desire to define the “right” technical solution by considering the available technical alternatives. These discussions of course include quality and price considerations, which may in turn be based on expected downstream implementation and upgrade cost, as well as efficiency, durability and other technical issues. As a result, in order to accommodate the needs and interests of the parties participating in the process - and leaving aside the rare case of outright collusion - the incentives of the participating companies are most often aligned to indeed identify the most efficient and functionally successful specification. This means that standard-setting processes are generally geared towards the optimal outcome for consumers.

13. In sum, standards are developed in anticipation of market acceptance and future profits and often in a competitive environment. During the standard-development process, different patented technologies may be competing for inclusion in the standard.⁵ Moreover, multiple standardisation initiatives may be proposed and implemented, resulting in competing alternative standards each of which can become highly

² For an illustration, see, Meisner, Rosen, Beckman & Bercovitz, *The Role of Voluntary Industry Standards in Environmental Supply-Chain Management, An Institutional Economics Perspective*, JOURNAL OF INDUSTRIAL ECOLOGY, Vol. 6, No. 3-4 (2002).

³ For a number of other illustrations, see Teece & Sherry, *The Interface Between Intellectual Property Law and Antitrust Law: Standard Setting and Antitrust*, 87 MINN. L. REV. 1913 (2003).

⁴ See also Balto, “Standard Setting in Network Economy,” Address Before Cutting Edge Antitrust Law Seminars International (Feb. 17, 2000), available at <http://www.ftc.gov/speeches/other/standardsetting.shtm> (describing a battle over standards in the supply wireless networking area).

⁵ Teece and Sherry point out that SSO members have an incentive to adopt societally – inefficient production techniques that avoid patented technology. Teece & Sherry, *supra* note 3.

successful. Absent monopsony conditions, there are generally no barriers for companies to start competing initiatives, or to affiliate themselves with existing standard setting activities. Nor is there any obligation for companies to become part of any particular standard-setting initiative, and many firms do, in fact, elect to rely on their ability to market their own technology without having been part of an SSO.

14. To this general picture one further element must be added: the temporal dimension. Indeed, while some standards may live long, sometimes evolving with numerous enhancements,⁶ many standards relate to products whose life cycle is short. For instance, in many fast-moving high-tech sectors, the life cycle of products can be less than two years. The implication of this observation is two-fold: (i) there is a need for efficient, expedient and effective standard-setting procedures because delays in standards discussions may result in delays in product launches, or markets may not develop altogether, and (ii) existing standards are often overtaken by newer standards in a relatively short time frame. Timing may thus have a profound impact on competition law analysis.

15. In many cases where new products are developed, SSOs involve innovators, as well as manufacturers and users. For instance, a computer chip SSO may involve representatives of both chipmakers and computer makers.⁷ And where that is not formally the case, it is nevertheless often essential to take the interests, concerns and requirements of the future users and other affected stakeholders into account to optimise the chances for market acceptance of the standard.

16. The composition of SSOs raises another point that sometimes gives rise to tensions. Firms involved in standard setting may have a common desire to develop a standard, but nonetheless have different interests, depending on their activities and business models. In particular, pure innovators earn their revenues solely by licensing their technology, while manufacturers that do not own intellectual property tend to consider royalties as a cost of production and therefore have an incentive to reduce or even eliminate them⁸. Vertically integrated firms that are active in technology markets, as well as downstream product markets may have mixed incentives⁹. These various diverging interests and motivations should be taken into account, not only when assessing the potential (or absence thereof) for collusion, but in particular when evaluating complaints by firms that they are being forced to pay “excessive” royalties for the use of other companies’ intellectual property.

17. The composition of SSOs is also important in terms of determining which parties should be admitted to take part in standard-setting discussions. This matter is of significant practical importance. Indeed, SSOs should be allowed to work effectively and, if necessary, be allowed to place reasonable limits on membership if necessary for the efficient functioning of the organization. This is particularly so if the timely availability of the specifications to non-members is safeguarded. In fact, far-reaching requirements to admit all participants expressing even casual interest may be counterproductive and perhaps even raise more competitive problems than exclusion.¹⁰

⁶ For instance, the first release of the UMTS standard for mobile telephony in 1999 has mutated to the 9th release in 2009.

⁷ Teece & Sherry, *supra* note 3.

⁸ See, European Commission, *Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, (May 2010) available at http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf at ¶¶ 271-272.

⁹ In this respect, it has been maintained that SSO rules may favour the users of intellectual property, rather than the owners, as the former outnumber the latter. See, Teece & Sherry, *supra* note 3.

¹⁰ It has also been suggested that requirements for SSOs to be overinclusive could result in less competition. See, Balto, *supra* note 4.

18. It is important to appreciate the distinction between standard setting and the exploitation of intellectual property. Many standards involve patented technology developed by industry, research institutes or other institutions. This distinction is particularly relevant where intellectual property rights “read” on the standard, i.e. where those intellectual property rights are necessarily infringed when a product is manufactured according to the specifications as laid down in the standard. While today most SSOs seek to obtain assurances or declarations that intellectual property owners will license their “essential” intellectual property covered by the standard on (F)RAND or similar terms, those assurances and declarations do not, in and of themselves, mandate any (furthergoing) commitment, nor do they prescribe the precise manner in which these rights are exploited. In some cases, the parties that hold essential intellectual property rights may voluntarily decide to establish a patent pool to make their technology available for interested parties that wish to manufacture products according to the standard specifications in an efficient manner. While voluntary patent pools may give rise to anticompetitive concerns in rare cases, they are generally associated with important efficiencies.¹¹

3. The pro- and anticompetitive effects of standardization agreements and the role of antitrust agencies

19. Today, there is consensus that standardization agreements generally have positive effects, in particular by encouraging the development of new products. Standards may also increase competition, particularly in downstream markets for standardized products, lower costs and increase output, benefitting consumers and economies as a whole. For many companies participating in a potentially successful standard is a significant driver for innovation. Many of these efficiencies are particularly likely to be recognized when compatibility standards are involved.

20. Equally undisputed is the general proposition that standard setting in some circumstances may give rise to anticompetitive effects. One concern is that standard-setting activities that include competitors provide the opportunity to reduce or eliminate (price) competition, either because the standard includes all significant rival technologies, or because the standard-setting discussions have unwanted horizontal spill-over effects in the affected (downstream) market. In addition to these “conventional” horizontal concerns, it is theorized that standard setting may limit technical development and innovation by foreclosing competing technologies from the market and, finally, that companies may violate antitrust law by “abusing” the dominant position that they derive from their intellectual property rights by “holding up” users after the adoption of the standard. The concern is that the owner of patents essential to the implementation of a standard may misrepresent or fail to disclose known patents essential to the implementation of a standard during the process and, once the standard is adopted, and be able to demand a higher royalty for the use of its technology than if the negotiations had been conducted before the standard was set. These latter concerns are sometimes framed as “exploitative abuse” cases¹².

21. Before addressing a number of the anticompetitive concerns sometimes raised in the context of standard setting, BIAC wishes to express its concerns about the proposition sometimes heard that standard setting is *particularly* prone to anticompetitive behaviour, that anticompetitive conduct occurs often and therefore requires specific remedial action. BIAC believes that this is incorrect. The private standards process generally operates effectively and in the interests of consumers, while the number of legitimate concerns and actual findings of antitrust liability are rare, despite the fact that the number of patents

¹¹ See, e.g., Layne-Farrar & Lerner, *To Join Or Not To Join: Examining Patent Pool Participation And Rent Sharing Rules*, (Jan. 7, 2008) available at <http://ssrn.com/abstract=945189>.

¹² See, Geradin & Rato, *Can Standard –Setting lead to Exploitative Abuse? A dissonant View on Patent Hold-Up, Royalty Stacking and the Meaning of FRAND*, (Apr. 2006) available at <http://ssrn.com/abstract=946792>.

reading on standards has increased dramatically over the past decades.¹³ Deliberate refusal to disclose known essential patents and related hold-up problems such as those that claimed to exist in *Rambus*¹⁴ do not occur frequently and neither do instances where intellectual property owners intentionally make and break false promises to license proprietary technology on RAND terms as was initially alleged in *Broadcom v. Qualcomm*¹⁵. Indeed, the empirical evidence on holdup attempts is weak or entirely lacking and the anecdotal evidence is uneven and often contradictory¹⁶. In BIAC's view, it would not be appropriate to formulate broad policies or make general statements of policy, e.g. in guidelines or other documents based on the few instances where concerns have been cited, when empirical evidence suggests that the vast majority of standard setting practices and activities do not raise competition law concerns.

22. By the same token, BIAC is concerned that antitrust agencies in Europe, China and elsewhere may be tempted to analyse standard-setting activities, as well as subsequent arrangements for the exploitation of intellectual property primarily from a static, *ex post*, perspective. This applies particularly where agencies would one-sidedly seek to control royalty rates, or stimulate the creation and exercise of monopsony power through coordinated actions of standard users. The reason is that static gains in the form of lower short-term royalty rates may lead to larger dynamic losses over time¹⁷.

23. BIAC believes there is an important role for antitrust agencies and courts to play in the area of standard setting, notably in ensuring that standard setting is not used as a platform for collusive behaviour. However, that role is best confined to a number of narrow and clearly defined areas. For instance, courts and agencies are not well-equipped to decide whether a particular standard adopted in the framework of a SSO is the "correct" standard, or whether a standard is "over- or under-inclusive." In this respect, BIAC has concerns about the overly broad implication of the statement in the draft EC Guidelines on Horizontal Cooperation Agreements, that "standards that set detailed technical specifications for a product or service may limit technical development and innovation."¹⁸ Without greater clarity regarding the specific problems that statement aims to capture, this statement appears to be without sound basis or empirical support. Similarly, antitrust agencies and courts are ill-equipped to decide whether the price charged for use of the technology is "unfair" or "unreasonable." In this respect, it is widely acknowledged that it is not the role of antitrust agencies to set or second-guess prices.¹⁹ BIAC believes that these and related matters should first

¹³ See Simcoe, *Explaining the Increase in Intellectual Property Disclosure*, (Dec. 8, 2005) available at http://www.rotman.utoronto.ca/timothy.simcoe/papers/SSO_IPR_Disclosures.pdf.

¹⁴ *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

¹⁵ *Qualcomm Inc. v. Broadcom Corp.*, 584 F. 3d 1004 (Fed. Cir. 2008).

¹⁶ See, Leveque & Meniere, *Vagueness in RAND Licensing Obligations is Unreasonable for Patent Owners*, (July 29, 2009), available at <http://ssrn.com/abstract=1030520>.

¹⁷ See, Easterbrook, *Ignorance and Antitrust*, in *INNOVATION & COMPETITIVENESS*, 82, 122-123 (Thomas M. Jorde & David J. Teece, eds.1992).

¹⁸ See, *supra* note 8, ¶ 260.

¹⁹ For instance, senior officials from the Canadian Competition Bureau have stated, with respect to Canada: "As a statute of general application, the Competition Act does not attempt to regulate individual transactions between buyers and sellers. . . . It is important to note that, under the [Competition Act], businesses are generally free to set their own prices at whatever level the market will bear. For the Competition Bureau, high prices or fees are a concern only when they are the result of a contravention of the Act, such as price fixing or abuse of a dominant position. . . . The Competition Bureau, as an independent law enforcement agency, does not have the ability to mandate, regulate or decide prices in any industry. . . ." Richard Taylor, Deputy Commissioner of Competition (Civil Matters) before the Standing Senate Committee on Banking, Trade and Commerce (Canada), March 25, 2009, available at http://www.parl.gc.ca/40/2/parlbus/commbus/senate/Com-e/bank-e/03eva-e.htm?%20Language=E&Parl=40&Ses=2&comm_id=3.

and foremost be determined by market forces and that antitrust intervention in this area can easily chill innovation, the development of beneficial standards, industry competitiveness and consumer choice. In contrast, antitrust agencies and courts are better placed to evaluate whether standard setting activities give rise to collective boycott actions, price fixing, collusive output reduction, or whether SSO participation rules unduly discriminate against certain parties.

24. In addition, it is important to note that SSOs are able, and in fact do, revise their rules to address perceived problems. This has occurred for example in relation to patent ambush concerns, where major standards organisations have evolved mechanisms for the *ex ante* disclosure of essential patents. In addition, SSOs such as ETSI and ITU/IEC are currently actively addressing the transferability of FRAND commitments on the assignment of IPRs to companies that are not members of the SSO. In so doing, SSOs seek to ensure to bind future owners of essential IPR to the FRAND commitment.

25. BIAAC submits that courts and agencies, when intervening in standard setting activities, should apply particular analytical rigour with a view to avoiding over-enforcement and false positive findings of antitrust liability. In particular, the mere fact that a specific technology has competed for inclusion in a standard, but has not been chosen and the standard has been set, does not by any means necessarily imply that that technology is actually or potentially excluded from the market or that the SSO or the participants in the standard discussions have infringed antitrust law²⁰. Indeed, the choice of any particular technical specification necessarily that other technical solutions were not chosen.

4. Patent hold-up and (F)RAND licensing obligations

26. Patent hold-up problems –i.e. patent owners who have knowingly misrepresented or knowingly failed to disclose patents essential to the implementation of the standard (that would not have been adopted absent such disclosure) and who thereafter- “hold up” patent users in the sense of demanding “excessive” royalties after the SSO has adopted the patented technology as an industry standard and manufacturers within the SSO have incurred substantial sunk cost to design and manufacture standard-compliant end products - may merit antitrust intervention in certain circumstances. However, BIAAC would stress that antitrust agencies should be exceptionally cautious in choosing to intervene in this area in light of the relative high probability of false positive findings of antitrust harm. Moreover, agencies must be conscious of the fact that for hold-up problems to occur a number of necessary conditions must be met²¹.

27. First, there must have been evidence *ex ante* of a substitute technical solution that could practicably have been chosen by the SSO if the SSO members had been aware of the conduct of the misrepresenting party. Indeed, if no such substitute exists, any market power derives legitimately from the strength of the intellectual property rather than the inclusion of the intellectual property in the standard.²²

28. Second, the party accused of engaging in an antitrust violation in the form of hold-up must have the requisite level of market power. Intellectual property does not in and of itself confer that power.²³ And

²⁰ This is, however, what ¶ 260 of the EC Draft Guidelines seems to suggest. *See, supra* note 8.

²¹ *See, e.g., Sidak, Patent Holdup and Oligopsonistic Collusion in Standard- Setting Organizations*, J. COMPETITION L. & ECON., 5(1), 123- 188, p. 135 and 168.

²² *See, e.g., Geradin, Pricing Abuses by Essential Patent Holders in a Standard- Setting Context: A View From Europe*, (July 2008) available at <http://ssrn.com/abstract=1174922>. The relationship between a firm’s alleged deceptive conduct in the context of a SSO and its acquisition of monopoly power was specifically discussed in the US Rambus case. The court of appeal held that there was insufficient evidence that Rambus’ technology would not have been chosen if it had disclosed its patents, and the loss of opportunity to seek favourable terms is not an antitrust violation. *Rambus Inc. v. FTC*, *supra* note 14.

²³ *See, Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

if the chosen standard is competing with other standards, the owner of the chosen technology may not have market power.²⁴

29. Non-disclosure of intellectual property in the standard-setting process, even when deceptive or fraudulent, does not in and of itself constitute an antitrust violation. The party alleging that such a violation took place, must establish that the non-disclosure resulted in harm to competition in the monopolised market. This position is in line with the U.S. Circuit Court decision in the *Rambus* case.²⁵

30. Fourth, widespread hold-up problems are not likely to occur as owners of intellectual property face pressure from a number of different directions not to engage in hold-up practices. In particular, the owner of intellectual property may be only one party among a number of owners of complementary and essential (i.e., “blocking”) IP, and must take into account the possibility of similar conduct by those parties, as well as the negative effect that its own conduct may have on the willingness of such parties to engage in complementary practices, such as cross-licensing. Similarly, the IP owner potentially faces retaliation by implementers, as standards and end products are dynamic, while further iteration of the standard-setting process in the future is common. In addition, the IP owner’s incentives to engage in hold-up strategies may be reduced, or eliminated altogether, because excessive royalty rates or overly aggressive terms could have a negative impact on the downstream market demand for the standardized product. In sum, for hold-up to occur, the party engaging in that practice must have a rare combination of ingredients to create the economic incentive to do this. As a result, as part of the theory of harm, antitrust agencies and courts should evaluate whether the party at hand indeed had those incentives in the first place.

5. Ex ante disclosure of maximum royalty rates and most restrictive non-royalty terms

31. In response to concerns raised by the potential for hold-up situations, it has been suggested that SSOs should be allowed to permit to require, at the time standards are under discussion, the ex ante disclosure by the patent owner of the maximum royalty that the patent owner would charge under the applicable FRAND regime. The information thus disseminated, i.e. the future cost of using the various patented technologies, would allow the participating companies (including future users) to factor that information into their decision whether to prefer one technology over the other for inclusion in the standard. In the recent past, the US Department of Justice issued two business review letters allowing this practice proposed by SSOs.²⁶ Ex ante disclosure of licensing terms is also dealt with under the draft EC Guidelines.²⁷ Significantly, the Antitrust Division stated that, unless the standard-setting process is used as a vehicle for naked price fixing or bid rigging, the U.S. Department of Justice will analyse these types of arrangements under the rule of reason standard of analysis.²⁸ The EC Commission takes a similar approach.

²⁴ See, Deborah Platt Majoras, Chairman, Federal Trade Commission, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, Remarks at Standardization and the Law: Developing the Golden Mean for Global Trade (Sept. 23, 2005), available at <http://www.ftc.gov/speeches/majoras/050923stanford.pdf> at 10.

²⁵ See, *supra* note 16.

²⁶ See, VITA Business Review Letter, Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep’t of Justice, to Robert Skitol, Esq. (Oct. 30, 2006), available at <http://www.justice.gov/atr/public/busreview/219380.pdf>; and IEEE Business Review Letter, Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep’t of Justice, to Michael A. Lindsay, Esq. (April 30, 2007), available at <http://www.usdoj.gov/atr/public/busreview/222978.pdf>.

²⁷ See, *supra* note 8.

²⁸ However, it may be relevant to distinguish between ex ante participation by groups of potential licensees in licensing discussions before a standard is chosen, versus such coordinated action after the standard has

32. BIAC agrees with the position that *ex ante* disclosure of maximum royalty rates may in some cases be beneficial. However, BIAC also believes that *ex ante* disclosure of maximum royalty rates may, depending on the facts of the case, give rise to a number of very significant concerns. This means that the mere early disclosure of those terms should be carefully distinguished from joint discussions among implementers, or, alternatively, among holders of intellectual property holders with competing technologies to fix the fees that they will pay or demand for the use of the intellectual property at hand. When involving discussions among downstream manufacturers that will require the use of the standardised technology, the arrangements may in many respects be akin to a horizontal buyers' cartel, the objective of which would be to minimize the cost of patent licenses, i.e. to force patent holders to accept lower royalty rates than they would normally charge. Indeed, the position of the U.S. Department of Justice with respect to *ex ante* negotiation by SSOs with patent holders arguably is somewhat at odds with its position with respect to monopsony buying in the agricultural industry and as expressed in the draft FTC/DOJ Horizontal Merger Guidelines. BIAC believes that such potential IP licensee cartels are of no less concern than potential IP licensor cartels as they may result in low and suboptimal royalty rates that may, in turn, discourage companies from investing in new technology and taking part in standard-setting initiatives. As a result, while forced *ex ante* disclosure of licensing terms may lead to some short term cost reductions, this practice may hamper long run dynamic efficiency.²⁹ In addition, *ex ante* disclosure rules and subsequent cartel-like behaviour may tempt SSOs to opt for low-cost, low quality technology, as opposed to more expensive but technically higher quality technology with greater potential consumer welfare gains.³⁰ In light of the importance of innovation for economic growth, as well as the lack of solid empirical evidence showing the frequency of genuine hold-up problems and the small magnitude of any static gains that *ex ante* maximum royalty disclosures might bring about, BIAC believes that antitrust agencies and courts should cautious with regard to forced joint discussions of licensing terms following *ex ante* disclosure rates and terms.³¹ In this regard, it may also be relevant whether those joint discussions take place before or after the standard has been established³². Finally, most SSOs have adopted mechanisms to protect against opportunistic behaviour by patent holders, in particular rules that seek assurances or declarations from patent owners to offer to license their patents on (F)RAND terms.³³ BIAC believes that these requirements may in many situations play a useful role and, as a consequence, obviate the need for additional (*ex ante* disclosure) rules, the effects of which are uncertain, at minimum.

been established. In particular, in its Business Review Letter regarding the 3G Patent Platform Partnership of November 12, 2002, the Department of Justice insisted that potential licensees not be allowed to participate collectively in the discussion of maximum cumulative royalty rates for 3G essential patents, after the standard was already in place, because it wished to prevent the buyers from collectively acquiring market power. *See*, 3G Patent Platform Partnership Business Review Letter, Letter from Charles A. James, Assistant Attorney Gen., U.S. Dep't of Justice, to Ky P. Ewing, Esq., *available at* <http://www.justice.gov/atr/public/busreview/200455.pdf>.

²⁹ *See, e.g.*, Schmalensee, *Standard-Setting, Innovation Specialists, and Competition Policy*, (Apr. 30, 2009) *available at* <http://www.ssrn.com/abstract=1219784>. *See also* Teece & Sherry, *supra* note 3. Sidak notes in addition that the pass on rate of static gains to consumers is disputed and uncertain. Sidak, *supra* note 21.

³⁰ *See*, Balto, *supra* note 4 for an illustration of competition between standards that offer different price/quality options. Technically higher quality technology may include include technology with lower implementation- or lifecycle cost.

³¹ Individual patent owners and implementers may and often do engage in *ex ante* bilateral negotiations outside of SSOs. BIAC is in favor of those mechanisms as they are likely to reflect market prices for the use of the technology.

³² *See, supra* note 28.

³³ *See, e.g.*, Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889 (2002).

6. (F)RAND) licensing terms

33. Many SSO rules require owners of intellectual property involved in standard setting to use reasonable efforts to disclose intellectual property rights that might possibly be essential to the implementation of the standard prior to the adoption of the standard, and to make licenses under those intellectual property rights available on fair, reasonable and non-discriminatory (FRAND) terms and conditions to members of the SSO, as well as interested third parties. While not commenting in detail on these requirements, BIAAC offers the following observations. First, FRAND disputes seem to occur only rarely and, if they do, appear in the vast majority of cases to be predominantly commercial in nature, subject to resolution as common law contractual disputes.³⁴ . Second, in most cases FRAND requirements appear to work³⁵. A third and related observation is that courts and antitrust agencies are ill-equipped to determine the “right” FRAND conditions. This applies in particular to the question of whether the terms at hand are “reasonable.”

7. Concluding observations

34. Below, BIAAC summarizes a number of its main observations.

- The Round Table on standard setting is of significant importance, in particular in light of current legislative and policy developments in Europe, South Korea and China.
- Competition law should be invoked in the standard-setting process to resolve disputes over intellectual property rights only in the most exceptional of circumstances. The mere fact that an intellectual property right is necessarily infringed upon when implementing a standard and is thus “essential” does not in and of itself constitute such an exceptional circumstance to warrant antitrust scrutiny, even if it is claimed that royalties are “excessive.”
- Standard setting is wide-spread, its efficiencies are well-recognised and genuine competitive concerns arise only infrequently.
- Standards are developed in the hope that the standard will gain market acceptance and stimulate the demand for the standardised products. Most standards are therefore developed in a competitive environment and some standards have only a limited lifetime.
- SSOs should be allowed to place reasonable limits on their membership in the interest of process effectiveness and efficiency without being faced with potential boycott claims based on competition law.
- Antitrust agencies are not well positioned to decide whether standards are under- or over-inclusive. Similarly, they are not well placed to rule on FRAND disputes, most of which are of a predominantly contractual nature.
- For genuine hold-up problems to exist, a number of specific conditions must be met.

³⁴ See, e.g., Brooks & Geradin, *Talking Contracts Seriously: The Meaning of the Voluntary Commitments to License Essential Patents on “Fair and Reasonable” Terms*, (Mar. 12, 2010) available at <http://ssrn.com/abstract=1569498>. See also, Brenning, *Competition & Intellectual Property Policy Implications of Late or No IPR Disclosure in Collective Standard-Setting*, (June 17, 2002) available at http://ec.europa.eu/competition/speeches/text/sp2002_037_en.pdf. (“It is further undesirable that the Commission is used as a negotiating lever in disputes before SSOs.”).

³⁵ See, e.g., Leveque & Meniere, *supra* note 16.

- Ex- ante disclosure requirements may not be permitted to mutate into collusive action on prices for inputs or outputs.