

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

Working Party No. 2 on Competition and Regulation

STANDARD SETTING

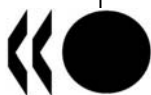
-- Germany --

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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.

Please contact Mr. Sean Ennis if you have any questions regarding this document [phone number: +33 1 45 24 96 55 -- E-mail address: sean.ennis@oecd.org].

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1. Introduction

1. This contribution to the Roundtable on Standard Setting builds on the contribution by the German delegation submitted to the Roundtable on Competition, Patents and Innovation of June 2009¹. It carries the discussion further by focusing on the standard setting aspects that are in play in the patent law field and their interaction with competition issues.

2. Both, standards and competition are important factors contributing to a key determinant of economic growth, i.e. innovation. However, the relationship between standard setting and competition law is inherently fraught with potential for conflict: Standard setting requires competitors to collaborate. Standards that set detailed technical specifications for a product or service codify a particular status quo and may actually limit the scope for different, competing routes of technical development and innovation. Standards, therefore, carry the risk of limiting competition.

2. Standard setting in Germany

2.1 General observations

3. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply.²

4. Standardisation, i.e. the elaboration and issuance of specifications which apply to more than one company, is organised not as a sovereign task in Germany, but by the private sector. It is handled, first and foremost, by “formal” national and international standardisation organisations (in Germany e.g. by DIN, the *Deutsches Institut für Normung*, and at international level by for example the ISO, the *International Organization for Standardization*). The standardisation work is based on institutionalised, consensual procedures, i.e. it involves all interested stakeholders in the respective standardisation project.

5. The DIN is a private sector organisation and is – according to an agreement with the Federal Republic of Germany of 1975³ – responsible for standardisation in Germany. DIN's primary task is to work closely with its stakeholders to develop consensus-based standards that meet market requirements. Experts contribute their skills and experience to the standardization process which takes place in working committees of the DIN. Thematically organised standards committees are the organs of the DIN. Some standards committees are “external committees” and are located not within DIN but with industry associations.

6. By agreement with the German Federal Government, DIN is the acknowledged national standards body that represents German interests in European and international standards organizations. Ninety percent of the standards work now carried out by DIN is international in nature. The work of the DIN standards committees mirror the work of the European standardisation institutes CEN (non-electrotechnical standardisation) and CENELEC (electrotechnical standardisation). The third European standardisation organisation ETSI deals with standards in the telecommunication sector. This organisation

¹ Cf. DAF/COMP(2009)22, p. 101 ff.

² Cf. Commission Notice – Guidelines on the applicability of Art. 81 to horizontal co-operation agreements, OJ C 3 of 06.01.2001, p. 2 ff., mn. 159.

³ Agreement of 05.06.1975 with the Federal Republic of Germany, cf. <http://www.din.de/cmd?menuid=47566&level=tpl-bereich&cmsareaid=47566&languageid=en>.

is special as it is not composed of delegates from national standardisation institutions; its membership is comprised of companies.

7. A second standardisation body is the DKE German Commission for Electrical, Electronic & Information Technologies of DIN and VDE (VDE Verband der Elektrotechnik Elektronik Informationstechnik e.V., the Association for Electrical, Electronic & Information Technologies). It is a non-profit service organization. DKE is a joint organization of DIN and VDE. VDE is responsible for the daily operations of DKE. DKE is the national organization responsible for the creation and maintenance of standards and safety specifications covering the areas of electrical engineering, electronics and information technology in Germany.

8. In addition, a number of “informal” standardisation forums and consortia draft sectoral and industry-wide standards. Often, to save time, these bodies have to be set up by groups of companies, especially in sectors with short product cycles, since the formal and consensual standardisation process is regarded as more time-consuming. Such an informal standardisation process may achieve the position of a “de-facto standard”.

9. The DIN acts as a cooperation partner for some of these established and permanent consortia. It furthermore offers to transfer standards established by the consortia into national, European or international standards.

10. In order to reduce trade barriers the German standardisation bodies aim to harmonize national and international standards.

11. According to DIN, a standard does not specify one technical solution, but rather contains requirements that form the framework for many different possible solutions.⁴ Moreover, well-devised standards may contribute to the rapid dissemination of technical knowledge, allowing a quick translation of research results into marketable technical products. Furthermore, European and international standards open up markets for new technologies throughout Europe and the world.

2.2 Terms of access and certification

12. The use of an established standard by a company for its products is entirely voluntary (at least in formal terms), as is participating in the standardisation process as a whole. Any company and other legal entities can become members of the German standardisation organisations.

13. Innovation and technical progress are regarded as the mainsprings of product and service quality by DIN, but they need to be in accordance with the relevant legislation. They require the effective use of technical standards. Any standards user having a question regarding the technical content of a standard (e.g. delivery conditions, dimensions, test instructions) is therefore free to contact the German standardisation organisations for assistance.

14. In some cases proof of compliance with certain standards may be required. In such cases standards users in Germany can make use of the certification services offered by DIN and its subsidiaries. Three associated companies of the DIN deal with certification issues (DIN CERTCO; DQS GmbH; DIN GOST). In these companies DIN holds a majority stake or is jointly engaged with companies of the Technical Inspection Organisation TÜV (*Technischer Überwachungsverein*).

⁴ Cf. DIN-Website at http://www.din.de/cmd?level=tpl-rubrik&languageid=en&cmsrubid=innovation_management.

3. Standard setting and competition rules

15. There is a broad area in which standard setting and competition co-exist without any tensions. However, conflicts may arise, both under the aspects of anti-competitive agreements and of abuse of dominance.

3.1 *Standard setting and the prohibition of agreements restricting competition*

16. Originally, German competition law offered the possibility to exempt standardisation agreements from the ban on cartels. However, this provision was abolished in 2005, when the German ARC was adapted to the corresponding substantive law of the EU Treaty. Henceforth, co-operation on standardisation is, both under EU and German competition law, measured by the “self-assessment” system to determine whether it violates the ban on anti-competitive agreements (Section 1 of the Act against Restraints of Competition, Art. 101 of the TFEU).

17. To facilitate interpretation of whether an agreement is exempt from the ban on anti-competitive agreements, criteria have been developed by the European Commission in the horizontal Guidelines.⁵ These criteria correspond to the ones developed in the realm of the WTO’s Technical Barriers to Trade Committee⁶. These criteria are, inter alia, based on the principles of openness, transparency, and non-discrimination. Thus, for example, to materialise the potential gains of standards for competition and innovation, all interested companies must in principle be able to participate in the setting of the standard in a transparent manner, and the necessary information to apply the standard must be effectively available to those wishing to enter the market. In essence, standards should be as open as possible.

18. The horizontal Guidelines of the European Commission – which give undertakings guidance for the self-assessment – are currently under review.⁷ The current draft version elaborates the situation and possible competition law infringements in more detail and acknowledges the problems which undertakings have faced in the past due to the inherent tension between standard setting and competition law. The draft Guidelines give details of which standard setting rules can be regarded as restricting or distorting competition and which aspects have to be considered by standard setting organisations.

19. The procedural rules of German standardisation bodies for the process of standardisation and the underlying principles are in line with those of the European and International standardisation bodies.

20. Furthermore, effective enforcement mechanisms are necessary to ensure compliance with these procedural rules. It is primarily the task of the standardisation organisations to monitor and enforce compliance with the criteria established by them.

21. Participants in the standardisation process need to be aware of the competition law implications that go along with IPRs and need to ensure that competition law is not infringed.

⁵ Cf. Commission Notice – Guidelines on the applicability of Art. 81 to horizontal co-operation agreements, OJ C 3 of 06.01.2001, p. 2 ff.

⁶ Cf. WTO Committee on Technical Barriers to Trade - Decisions and Recommendations adopted by the Committee since 1 January 2005, G/TBT/1/Rev.7.

⁷ The draft Horizontal Guidelines have been published for consultation at http://ec.europa.eu/competition/consultations/2010_horizontals/index.html.

3.2 *Standard setting and the abuse of a dominant position*

22. Standard setting may also be in conflict with the competition rules on the abuse of a dominant position. This problem is particularly relevant for proprietary standards. These are standardized technologies which are tied up with IPRs. This is the case for example when a standard is based on a patent-protected technology.

23. Proprietary standards have a great potential to impede competition. After all, there is a risk that existing IPRs will prevent competitors from having access to the standard. Without a right to use the intellectual property, it is not possible to use the technology in question and it may not be possible to compete. A standard relying on an IPR-protected technology may lead to fencing off a monopoly market – with the result that a key objective of standardisation, i.e. to facilitate market access, would be counteracted.

24. Nevertheless, or precisely because of this, standardisation procedures are increasingly being confronted with “patent ambushes”, i.e. a situation in which the holder of relevant IPRs participates in the creation of the standard, but does not disclose the existence of these IPRs. The existence of these (potentially) standard-relevant IPRs is thus not publicly known (e.g. because the patent has been registered, but not yet awarded). In the following process the patent holder tries to incorporate the protected technology as part of the standard. After the incorporation of the patent or technology into the standard, the patent holder discloses the existence of the IPRs and tries to obtain extraordinarily high licence fees for use of the patent. The patent holder of one very valuable patent for the standard can thus threaten to obtain an injunction unless the licence fee demands are met. This scenario, which may also occur independently of a preceding patent ambush, is also referred to as “hold-up”.

25. Depending on the circumstances this behaviour may be regarded as an abuse of a dominant position which is prohibited under German and European Law (Section 19 of the Act against Restraints of Competition, Art. 102 of the TFEU). German courts, however, have so far not given their final judgement on this interpretation.

3.3 *Standard setting body disclosure rules*

26. In order to counter these dangers, some standardisation organisations have introduced internal procedural rules to balance the needs of standardisation for public use and the interests of the owners of IPRs.

27. Considering the impact of patent ambushes, it is of crucial importance for relevant IPRs to be identified in time in the course of a standard setting process. All questions concerning the handling of IPRs should be resolved as comprehensively and early as possible, both amongst the parties to the standardisation procedure and in terms of the effect on third parties. This also implies that it might be useful to stipulate subsequent licence fees and conditions prior to the adoption of the standard. Agreement on a basic calculation method for licence fees (and the related maximum rates) and on minimum licence conditions can ensure that the advantages of standardisation are actually disseminated. Competition-related concerns do not stand in the way of such an approach. Rather, this can usually be viewed as a necessary element of the standardisation process, since it prevents subsequent abusive practices which have the potential to undermine the entire success of the standardisation work.

28. German standardisation bodies have also identified the dangers of patent ambushes. Thus, the DIN has integrated rules on handling IPRs into their internal procedural rules. The stakeholders involved in the standardisation procedure are generally required to report IPRs in advance. If existing IPRs are identified, the holder has to disclose whether he will be willing to grant a royalty-free licence to these IPRs

or to make a pledge to make it possible for the other parties in the standardisation process and for third parties to use the standardisation results, e.g. by obtaining a licence for the IPR at fair, reasonable and non-discriminatory (“FRAND”) conditions.

29. If the patent holder refuses to grant royalty-free licences or licences under FRAND terms, the standardisation process is suspended. The standard will then be redesigned in order to circumvent the IPRs in question.

3.4 *Relevant case law*

30. Disputes about standards are usually taken to court within a patent infringement proceeding. Typically, in these cases the patent holder takes to court a potential infringer/ licensee claiming an infringement of the patented standard-essential technology. In general, the defendant in such a case will raise the so-called competition law defence in order to justify his actions. German courts have accepted this defence in patent infringement proceedings. However, the content and the scope of the defence are still unclear and disputed.

31. In the recent past, complaints by companies against the anti-competitive behaviour of patent holders have increased. However, so far no decisions by the *Bundeskartellamt* or other German competition authorities have emerged from this.

32. To date, the German competition authorities have not decided on the question of a competition law infringement in the realm of a standardisation process. Furthermore, so far no decision has been taken with regard to a possible abuse of a dominant market position on the grounds of standard-essential IPRs.

33. Also, to date neither the *Bundeskartellamt* nor the German courts have had to deal with the question of royalty-free standards. This is presumably due to the fact that most proceedings dealing with problems of standard setting and competition law are patent infringement proceedings which ultimately aim at a resolution on a monetary level.

34. In the last decade German courts have had to deal with different issues of standard setting. All these cases were taken forward as patent infringement proceedings. Patent infringement proceedings are civil law proceedings in Germany.

35. The following presentation of cases builds upon the presentation made in the Roundtable on Competition, Patents and Innovation. From the available case law the following lessons can be deduced with regard to standard setting:

- The Federal Court of Justice (*Bundesgerichtshof*) ruled that it can constitute a violation of the ban on discrimination if a patent holder refuses to grant a licence for an IPR that constitutes a (de facto) standard which it has granted to other domestic and foreign firms (either with or without the payment of royalties)⁸. Similar companies would thus be treated differently without any objective justification.⁹

⁸ For the details of the case and the reasoning of the court cf. the German contribution to the Roundtable, DAF/COMP(2009)22, p. 101 ff and Federal Court of Justice (BGH), decision of 13.07.2004, KZR 40/02 – Standard-Spundfaß, online at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=afd17569ae503cb56f3e1ee98d7e8745&client=12&nr=47897&linked=pm&Blank=1>; only available in German.

⁹ Cf. Federal Court of Justice (BGH), decision of 13.7.2004, KZR 40/02, loc. cit., p. 12.

- The Federal Court of Justice held in a further case that a company which manufactures products under a patented industrial standard without a licence could use the competition law defence against the holder of the patent.¹⁰ This means that the user of the patent can claim that the patent holder is abusing his dominant position which derives from the standard by depriving him of the use of the patent. According to the court the user would have to prove that he tried unsuccessfully to obtain a licence under adequate terms and conditions, and that by refusing to grant the licence the holder of the patent was violating the prohibition under competition law of hindering other companies or treating them differently from similar companies without any objective justification.
- Finally, in the most recent case, the District Court of Mannheim¹¹ (*Landgericht Mannheim*) dealt with the current issue of a patent licence manager or non-practicing entity holding standard-essential patents.¹² In its ruling the court inter alia did not find the enforcement of patents by a patent licence manager, which had bought the standard-essential patents from another producing company, abusive. The court also ruled that the transfer of patents to the non-practicing entity in question, which had not pledged to grant licences for the standard-essential patents under FRAND conditions, did not constitute an infringement of Art. 81 EC (now Art. 101 TFEU) and was thus not invalid. The ruling in this case is not final.

4. Conclusion

36. Standards play an essential role in the process of innovation. On condition that the standard setting occurs through open and transparent processes, and that standards are generally available for all interested parties, they create a level playing field on which all market participants can compete.

37. Forms of conduct that may have restrictive effects on competition, such as hold-ups, patent ambushes and the charging of abusive royalty rates by holders of IPR in the case of a proprietary standard, should be addressed at the earliest possible stage during the standard setting process. Standard setting organisations need to ensure that the standard setting process in general does not lead to the discrimination or foreclosure of third parties or segment markets.

¹⁰ For the details of the case and the reasoning of the parties cf. the German contribution to the Roundtable, DAF/COMP(2009)22, p. 101 ff and Federal Court of Justice (BGH), decision of 6 May 2009, KZR 39/06, online at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=b5343b8e4b42c68ccd0ee220ba41f048&clien t=12&nr=48134&pos=0&anz=1>; only available in German; press release online at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=afd17569ae503cb56f3e1ee98d7e8745&client =12&nr=47897&linked=pm&Blank=1>; only available in German.

¹¹ For the details of the case and the reasoning of the parties cf. the German contribution to the Roundtable, DAF/COMP(2009)22, p. 101 ff and Federal Court of Justice (BGH), decision of 6 May 2009, KZR 39/06, online at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=b5343b8e4b42c68ccd0ee220ba41f048&clien t=12&nr=48134&pos=0&anz=1>; only available in German; press release online at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=afd17569ae503cb56f3e1ee98d7e8745&client =12&nr=47897&linked=pm&Blank=1>; only available in German.

¹² Non-practicing entities do not have any production of their own; their sole activity is the licensing of its patents. Such companies are sometimes referred to as “patent trolls”.

38. Based on these cases German courts and the Bundeskartellamt have identified certain issues and competition law problems in the context of standard setting. The principles on the handling of these issues are developed during the application of the law in individual cases.