STANDARDISATION AGREEMENTS: COMMISSION DRAFT GUIDELINES

Subject: Standardisation agreements
Relevant market
Market power
Exemption

Industry: Most industries

Source: Commission paper entitled Draft Guidelines on the Application of Article 81 to horizontal cooperation

(Note. This extract from the Commission's draft guidelines on horizontal agreements is the latest in the series of reports begun in our July issue. It is concerned with standardization agreements, which are defined in paragraphs 151 and 152. On the face of it, standardization agreements are a desirable, and in many markets a necessary, condition for an industry to function efficiently. At the same time, it would be unwise for anti-trust authorities to be too relaxed about this type of agreement, since it might not be unduly difficult to use standards as the means to restrict competition and to create cartels. Whether the standards are developed by industry or laid down by public bodies, they can still be misused for commercial purposes; and, as the Commission rightly points out in paragraph 154, the involvement of public bodies is subject to the obligations of Member States regarding the preservation of undistorted competition in the Community. The Guidelines usefully set out the circumstances in which standardization agreements do not restrict competition, those in which agreements usually restrict competition and those in which the agreements may restrict competition. It also sets out the circumstances in which restrictive standardization agreements may nevertheless be exempted.)

6. AGREEMENTS ON STANDARDS

6.1. Definition

151. Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes or methods may comply. (Standardisation can take different forms, ranging from the adoption of national consensus based standards by the recognised European or national standards bodies, through consortia and fora, to agreements between single companies. Although Community law defines standards in a narrow way, these guidelines qualify as standards all agreements as defined in this paragraph.) Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in markets where compatibility and interoperability with other products or Systems is essential. The terms of access to a particular quality mark or for approval by a regulatory body can also be regarded as a standard.

152. Not covered by these guidelines are standards related to the provision of professional services, such as rules of admission to a liberal profession.

6.2. Relevant markets

153. Standardisation agreements produce their effects on three possible markets, which will be defined according to the Commission notice on market definition. First, the product market(s) to which the standard(s) relates. Standards on entirely new products may raise issues similar to those raised for R&D agreements, as far as market definition is concerned. Second, the service market for standard setting, if different standard seuing bodies or agreements exist. Third, where relevant, the distinct market for testing and certification.

6.3. Assessment under Article 81(l)

154. Agreements to set standards may be either concluded between private undertakings or set under the aegis of pub he bodies or bodies having been entrusted with the operation of services of general economic interest, such as the standards bodies recognised under Directive 98/34/EC, laying down a procedure for the provision of information in the field of technical standards and regulations. The involvement of such bodies is subject to the obligations of Member States regarding the preservation of non distorted competition in the Community. (Under Article 4(2)(3) of Council Regulation 17/62, agreements which have as their sole object the development or the uniform application of standards and types need not, but may, be notified to the Commission.)

6.3.1. Nature of the agreement

6.3.1.2. Agreements that do not fall under Article 81(1)

155. Where participation in standard setting is unrestricted and transparent, standardisation agreements as defined above, which set no obligation to comply with the standard or which are parts of a wider agreement to ensure compatibility of products, do not restrict competition. This normally applies to standards adopted by the recognised standards bodies which are based on non-discriminatory, open and transparent procedures.

156. No appreciable restriction exists for those standards that have a negligible coverage of the relevant market, as long as it remains so. No appreciable restriction is found either in agreements which pool together SMEs to standardise access forms or conditions to collective tenders or those that standardise aspects like minor product characteristics, forms and reports, which have an insignificant effect on the main factors affecting competition in the relevant markets.

6.3.1.2. Agreements that almost always fall under Article 81(1)

157. Agreements that use a standard as a means amongst other parts of a broader restrictive agreement aimed at excluding actual or potential competitors

will almost always be caught by Article 81(1). For instance, an agreement whereby a national association of manufacturers would set a standard and put pressure on third parties not to market products that do not comply with the standard would be in this category.

6.3.1.3. Agreements that may fall under Article 81(1)

158. Standardisation agreements may be caught by Article 81(1) insofar as they grant the parties joint control over production and/or innovation, thereby restricting their ability to compete on product characteristics, while affecting third parties like suppliers or purchasers of the standardised products. The assessment of each agreement must take into account the nature of the standard and its likely effect on the markets concerned, on the one hand, and the scope of possible restrictions that go beyond the primary objective of standardisation, as defined above, on the other.

159. The existence of a restriction of competition in standardisation agreements depends upon the extent to which the parties remain free to develop alternative standards or products that do not comply with the agreed standard. Standardisation agreements may restrict competition where they prevent the parties from either developing alternative standards or commercialising products that do not comply with the standard. Agreements that entrust certain bodies with the exclusive right to test compliance with the standard go beyond the primary objective of defining the standard and may also restrict competition. Agreements that impose restrictions on marking of conformity with standards, unless imposed by regulatory provisions, may also restrict competition.

6.3.2. Market power and market structures

160. High market shares held by the parties in the market(s) affected will not necessarily be a concern for standardisation agreements. Their effectiveness is often proportional to the share of the industry involved in setting and/or applying the standard. On the other hand, standards that are not accessible to third parties may discriminate or foreclose third parties or segment markets according to their geographic scope of application. Thus, the assessment whether the agreement restricts competition will focus, necessarily on an individual basis, on the extent to which such barriers to entry are likely to be overcome.

6.4. Assessment under Article 81(3)

6.4.1. Economic benefits

161. The Commission generally takes a positive approach towards agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions. To materialise those economic benefits, the necessary information to apply the standard must be available to those wishing to enter the market and an appreciable proportion of the industry must be involved in the setting of the standard in a transparent

manner. It will be for the parties to demonstrate that any restrictions on the setting, use or access to the standard provide economic benefits.

162. In order to reap technical or economic benefits, standards should not limit innovation. This will depend primarily on the lifetime of the associated products, in connection with the market development stage (fast growing, growing, stagnant...). The effects on innovation must be analysed on a case-by-case basis. The parties may also have to provide evidence that collective standardisation is efficiency-enhancing for the consumer when a new standard may trigger unduly rapid obsolescence of existing products, without objective additional benefits.

6.4.2. Indispensability

163. By their nature, standards will not include all possible specifications or technologies. In some cases, it would be necessary for the benefit of the consumers or the economy at large to have only one technological solution. However, this standard must be set on a nondiscriminatory basis. Ideally, standards should be technology neutral. In any event, it must be justifiable why one standard is chosen over another.

164. All competitors in the market(s) affected by the standard should have the possibility of being involved in discussions. Therefore, participation in standard setting should be open to all, unless the parties demonstrate important inefficiencies in such participation or unless recognised procedures are foreseen for the collective representation of interests, as in formal standards bodies.

165. As a general rule there should be a clear distinction between the setting of a standard and, where necessary, the related R&D, and the commercial exploitation of that standard. Agreements on standards should cover no more than what is necessary to ensure their aims whether this is technical compatibility, or a certain level of quality. For instance, it should be very clearly demonstrated why it is indispensable for the economic benefits to materialise that an agreement to disseminate a standard in an industry where only one competitor offers an alternative should oblige the parties to the agreement to boycott the alternative.

6.4.3. No elimination of competition

166. There will clearly be a point at which the specification of a private standard by a group of firms that are jointly dominant is likely to lead to the creation of a de facto industry standard. The main concern will then be to ensure that these standards are as open as possible and applied in a clear non-discriminatory manner. To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms.

167. To the extent that private organisations or groups of companies Set a standard or their proprietary technology becomes a de facto standard, then competition will be eliminated if third parties are foreclosed from access to this standard.

6.5. Examples

168. Example 1. *Situation:* Standard EN 60603-7:1993 defines the requirements to connect television receivers to video-generating accessories such as video recorders and video games. Although the standard is not legally binding, in practice manufacturers both of television receivers and of video games use the standard, as the market requires so. *Analysis:* Article 81(1) is not infringed. The standard has been adopted by recognised standards bodies, at national, European and international level, through open and transparent procedures, and is based on national consensus reflecting the position of manufacturers and consumers. All manufacturers are allowed to use the standard.

169. Example 2. *Situation:* A number of videocassette manufacturers agree to develop a quality mark or standard to denote the fact that the videocassette meets certain minimum technical specifications. The manufacturers are free to produce videocassettes which do not conform to the standard and the standard is freely available to other developers. *Analysis:* Provided that the agreement does not otherwise restrict competition, Article 81(1) is not infringed, as participation in standard setting is unrestricted and transparent, and the standardisation agreement does not set an obligation to comply with the standard. If the parties agreed only to produce videocassettes which conform to the new standard, the agreement would limit technical development and prevent the parties from selling different products which would infringe Article 81(1).

170. Example 3. *Situation:* A group of competitors active in various markets which are interdependent with products that must be compatible, and with over 80% of the relevant markets, agree to jointly develop a new standard that will be introduced in competition with other standards already present in the market, widely applied by their competitors. The various products complying with the new standard will not be compatible with existing standards. Because of the significant investment needed to shift and to maintain production under the new standard, the parties agree to commit a certain volume of sales to products complying with the new standard so as to create a "critical mass" in the market. They also agree to limit their individual production volume of products not complying with the standard to the level attained last year. *Analysis:* This agreement, owing to the parties' market power and the restrictions on production, falls under Article 81(1), while not being likely to fulfil the conditions of Article 81(3), unless access to technical information were provided on a non-discriminatory basis and on reasonable terms to other suppliers wishing to compete. ■

Horizontal Agreements

The last report in this series will appear in our next issue (December, 2000). It will be on the subject of environmental agreements. These are agreements under which competing traders agree on certain environmental objectives, such as pollution abatement.