Volkswagen AG

Supplement 2: Question 4.17 and 6.1 (5)

Review of the HBER and Guidelines - Input to Section on Standardization Agreements (Guidelines)

In the following overview, we share our comments to some of the specific paragraphs of the Guidelines that relate to 'standardization agreements'.

Original Text	Volkswagen Comments and Suggestions
7.1. Definition	
257. 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 (95). Standardisation agreements can cover various issues, such as standardisation of different grades or sizes of a particular product or technical specifications in product or services 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. Agreements setting out standards on the environmental performance of products or production processes are also covered by this chapter. 258. The preparation and production of technical standards as part of the execution of public powers are not covered by these guidelines (96). The European standardisation bodies recognised under Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and on rules on Information Society services (97) are subject to competition law to the extent that they can be considered to be an undertaking or an association of undertakings within the meaning of Articles 101 and 102 (98). Standards related to the provision of professional services, such as rules of admission to a liberal profession, are not covered by these guidelines.	
7.2. Relevant markets	

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261. Standardisation agreements may produce their effects on four possible markets, which will be defined according to the Market Definition Notice. First, standard-setting may have an impact on the product or service market or markets to which the standard or standards relates. Second, where the standard-setting involves the selection of technology and where the rights to intellectual property are marketed separately from the products to which they relate, the standard can have effects on the relevant technology market (101). Third, the market for standard-setting may be affected if different standard-setting bodies or agreements exist. Fourth, where relevant, a distinct market for testing and certification may be affected by standard-setting.	
7.3. Assessment under Article 101(1)	
7.3.1. Main competition concerns	
263. Standardisation agreements usually produce **significant positive economic effects** (102), for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance quality, provide information and ensure interoperability and compatibility (thus increasing value for consumers).	
264. Standard-setting can, however, in specific circumstances, also give rise to **restrictive effects on competition** by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development. This can occur through three main channels, namely reduction in price competition, foreclosure of innovative technologies and exclusion of, or discrimination against, certain companies by prevention of effective access to the standard. 265. ***First***, if companies were to engage in anti-competitive discussions in the context of standard-setting, this could reduce or eliminate price competition in the markets concerned, thereby facilitating a collusive outcome on the market (103). 266. ***Second***, standards that set detailed technical specifications for a product or service may limit technical development and innovation. While a standard is being developed, alternative technologies can compete for inclusion in the standard. Once one technology has been chosen and the standard has been set, competing technologies and companies may face a barrier to entry and may potentially be excluded from the market. In addition, standards requiring that a particular technology is used exclusively for a standard or preventing the development of other technologies by obliging the members of the standard-setting organisation to exclusively use a particular standard, may lead to the same effect. The risk of limitation of innovation is increased if one or more companies are unjustifiably excluded from the standard-setting process. 267. In the context of standards involving intellectual property rights ('IPR') (104), **three main groups of companies** with different interests in standard-setting can be	Section 267 should be rewritten to better characterize the participants in the standardization environment. Also, it should be clarified that in many SDOs there is a requirement for reciprocal SEP licenses which implies that most or even all license agreements are cross-license agreement with a consideration component: *In the context of standards involving intellectual property rights ('IPR') (104), **three main groups of companies** with different interests in standard-setting can be distinguished in the abstract (105). **First**, there are upstream-only companies that solely develop and market technologies. Their only source of income is licensing revenue and their incentive is to maximise their royalties. **Secondly**, there are downstream-only companies that solely manufacture products or offer services based on technologies developed by others and do not hold relevant IPR. Royalties represent a cost for them, and not a source of revenue, and their incentive is to ~~reduce or avoid~~ minimize royalties. **Finally**, there are vertically integrated companies that both develop technology and sell products. They have mixed incentives. On the one hand, they can draw licensing revenue from their IPR. On the other hand, they may have to pay royalties to other companies holding IPR essential to the standard.* ~~*They might therefore cross-license their own essential IPR in exchange for essential IPR held by other companies.*~~

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269. Intellectual property laws and competition laws share the same objectives (106) of **promoting innovation and enhancing consumer welfare**. IPR promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. IPR are therefore in general pro-competitive. However, by virtue of its IPR, a participant holding IPR essential for implementing the standard, could, in the specific context of standard-setting, also acquire control over the use of a standard. When the standard constitutes a barrier to entry, the company could thereby control the product or service market to which the standard relates. This in turn could allow companies to behave in anti-competitive ways, for example by **'holding-up' users** after the adoption of the standard either by refusing to license the necessary IPR or by extracting excess rents by way of excessive (107) royalty fees thereby preventing effective access to the standard. However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard	Non-compliance with the FRAND commitment should be considered a violation of competition rules that should be enforced by competition authorities. We propose that the guidelines remain very clear on this point, and emphasize the relevance of the applicable competition law considerations.

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equates to **the possession or exercise of market power**. The question of market power can only be assessed on a case by case basis.	
7.3.2. Restrictions of competition by object	
Standardisation agreements 273. Agreements that use a standard as part of a broader restrictive agreement aimed at excluding actual or potential competitors restrict competition by object. For instance, an agreement whereby a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard or where the producers of the incumbent product collude to exclude new technology from an already existing standard (108) would fall into this category. 274. Any agreements to reduce competition by using the disclosure of most restrictive licensing terms prior to the adoption of a standard as a cover to jointly fix prices either of downstream products or of substitute IPR or technology will constitute restrictions of competition by object (109).	
7.3.3. Restrictive effects on competition	
Standardisation agreements **Agreements normally not restrictive of competition** 277. Standardisation agreements which do not restrict competition by object must be analysed **in their legal and economic context** with regard to their actual and likely effect on competition. In the absence of market power (110), a standardisation agreement is not capable of producing restrictive effects on competition. Therefore, restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards. 278. For those standard-setting agreements which risk creating market power, paragraphs 280 to 286 set out **the conditions under which such agreements would normally fall outside the scope of Article 101(1)**. 279. The non-fulfilment of any or all of the principles set out in this section will not lead to any presumption of a restriction of competition within Article 101(1). However, it will necessitate **a self-assessment** to establish whether the agreement falls under Article 101(1) and, if so, if the conditions of Article 101(3) are fulfilled. In this context, it is recognised that there exist different models for standard-setting and that competition within and between those models is a positive aspect of a market economy. Therefore, standard-setting organisations remain entirely free to put in place rules and procedures that do not violate competition rules whilst being different to those described in paragraphs 280 to 286. 280. Where participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply (111) with the standard and provide access to the standard on fair,	It will be important to maintain the arguments in paragraph 279 that "standard-setting organizations remain entirely free to put in place rules and procedures that do not violate competition rules whilst being different to those described in paragraphs 280 to 286".

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reasonable and non-discriminatory terms will normally not restrict competition within the meaning of Article 101(1). 281. In particular, to ensure unrestricted participation the rules of the standard-setting organisation would need to guarantee that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard. The standard-setting organisations would also need to have objective and non-discriminatory procedures for allocating voting rights as well as, if relevant, objective criteria for selecting the technology to be included in the standard. 282. With respect to transparency, the relevant standard-setting organisation would need to have procedures which allow stakeholders to effectively inform themselves of upcoming, on-going and finalised standardisation work in good time at each stage of the development of the standard.	
283. Furthermore, the standard-setting organisation's rules would need to ensure **effective access to the standard on fair, reasonable and non discriminatory terms** (112). 284. In the case of a standard involving IPR, a clear and balanced IPR policy (113), adapted to the particular industry and the needs of the standard-setting organisation in question, increases the likelihood that the implementers of the standard will be granted effective access to the standards elaborated by that standard-setting organisation. 285. In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an **irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms ('FRAND commitment')** (114). That commitment should be given prior to the adoption of the standard. At the same time, the IPR policy should allow IPR holders to exclude specified technology from the standard-setting process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard. To ensure the effectiveness of the FRAND commitment, there would also need to be a requirement on all participating IPR holders who provide such a commitment to ensure that any company to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller.	We propose to make it clear that IPR owners cannot be forced to formally offer licenses to all potential licensees as this seems not feasible, but there needs to be an obligation to provide offers to ALL potential licensees on request. But it must remain clear that access to all requires license offers to all. *285: In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an* ***irrevocable commitment in writing to offer to license their essential IPR to all third parties on request on fair, reasonable and non-discriminatory terms ('FRAND commitment').*** *That commitment should be given prior to the adoption of the standard. At the same time, the IPR policy should allow IPR holders to exclude specified technology from the standard-setting process and thereby from the commitment to offer to license, providing that exclusion takes place at an early stage in the development of the standard. To ensure the effectiveness of the FRAND commitment, there would also need to be a requirement on all participating IPR holders who provide such a commitment to ensure that any company to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller.* Furthermore there needs to be a provision on how SDOs should deal with IPR that is not owned by standardization participants. Proposal: *„Furthermore, the IPR policy should allow IPR holders that participate in standardization to notify the standard-setting organisation about the existence of potentially relevant IPR held by entities not being a member of and/or without active participation in the standard-setting process. In response, the standard-setting organisation is obliged to approach the respective entities to request submission of a FRAND commitment with*

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	respect to the potentially relevant IPR. Preferably, such notification should be given prior to the adoption of the standard.".
286. Moreover, the IPR policy would need to require **good faith disclosure**, by participants, of their IPR that might be essential for the implementation of the standard under development. This would enable the industry to make an informed choice of technology and thereby assist in achieving the goal of effective access to the standard. Such a disclosure obligation could be based on ongoing disclosure as the standard develops and on reasonable endeavours to identify IPR reading on the potential standard (115). It is also sufficient if the participant declares that it is likely to have IPR claims over a particular technology (without identifying specific IPR claims or applications for IPR). Since the risks with regard to effective access are not the same in the case of a standard-setting organisation with a royalty-free standards policy, IPR disclosure would not be relevant in that context.	It should be considered to mandate the individual declaration of potentially essential IPR and to disincentivize so-called blanket declarations. Blanket declarations may impede industry to make an informed choice of technology, since it is unclear what contribution to the standard was made by companies that filed a blanket declaration.
FRAND Commitments 287. FRAND commitments are designed to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions. In particular, FRAND commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees. 288. Compliance with Article 101 by the standard-setting organisation does not require the standard-setting organisation to verify whether licensing terms of participants fulfil the FRAND commitment. Participants will have to assess for themselves whether the licensing terms and in particular the fees they charge fulfil the FRAND commitment. Therefore, when deciding whether to commit to FRAND for a particular IPR, participants will need to anticipate the implications of the FRAND commitment, notably on their ability to freely set the level of their fees.	
289. In case of a dispute, the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on **whether the fees bear a reasonable relationship to the economic value of the IPR**. In general, there are various methods available to make this assessment. In principle, cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular patent or groups of patents. Instead, it may be possible to compare the licensing fees charged by the company in question for the relevant patents in a competitive environment before the industry has been locked into the standard (ex ante) with those charged after the industry has been	If the document addresses valuation issue at all it should be made clear that the relevant value is not the economic value of the IPR but the economic value of the technology and the relative value of the IPR covering that technology: *289. In case of a dispute, the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on* ***whether the fees bear a reasonable relationship to the value of the IPR covering the standardized technology and to the value of the standardized technology itself.***

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locked in (ex post). This assumes that the comparison can be made in a consistent and reliable manner. 290. Another method could be to obtain an independent expert assessment of the objective centrality and essentiality to the standard at issue of the relevant IPR portfolio. In an appropriate case, it may also be possible to refer to ex ante disclosures of licensing terms in the context of a specific standard-setting process. This also assumes that the comparison can be made in a consistent and reliable manner. The royalty rates charged for the same IPR in other comparable standards may also provide an indication for FRAND royalty rates. These guidelines do not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive. 291. However, it should be emphasised that nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the **competent civil or commercial courts**.	*In general, there are various methods available to make this assessment. In principle, cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular patent or groups of patents. Instead, it may be possible to compare the licensing fees charged by the company in question for the relevant patents in a competitive environment before the industry has been locked into the standard (ex ante) with those charged after the industry has been locked in (ex post). This assumes that the comparison can be made in a consistent and reliable manner.*
Effects based assessment for standardisation agreements 292. The assessment of each standardisation agreement must take into account **the likely effects** of the standard on the markets concerned. The following considerations apply to all standardisation agreements that depart from the principles as set out in paragraphs 280 to 286. 293. Whether standardisation agreements may give rise to restrictive effects on competition may depend on whether the members of a standard-setting organisation remain free to develop alternative standards or products that do not comply with the agreed standard (118). For example, if the standard-setting agreement binds the members to only produce products in compliance with the standard, the risk of a likely negative effect on competition is significantly increased and could in certain circumstances give rise to a restriction of competition by object (119). In the same vein, standards only covering minor aspects or parts of the end-product are less likely to lead to competition concerns than more comprehensive standards. 294. The assessment whether the agreement restricts competition will also focus on **access to the standard**. Where the result of a standard (that is to say, the specification of how to comply with the standard and, if relevant, the essential IPR for implementing the standard) is not at all accessible, or only accessible on discriminatory terms, for members or third parties (that is to say, non-members of the relevant standard-setting organisation) this may discriminate or foreclose or segment markets according to their geographic scope of application and thereby is likely to restrict competition. However, in the case of several competing standards or in the case of effective competition between the standardised solution and non-standardised solution, a limitation of access may not produce restrictive effects on competition. 295. If participation in the standard-setting process is open in the sense that it allows all competitors (and/or stakeholders) in the market affected by the standard to take part in choosing and elaborating the standard, this will lower the risks of a likely restrictive	

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effect on competition by not excluding certain companies from the ability to influence the choice and elaboration of the standard (120). The greater the likely market impact of the standard and the wider its potential fields of application, the more important it is to allow equal access to the standard-setting process. However, if the facts at hand show that there is competition between several such standards and standard-setting organisations (and it is not necessary that the whole industry applies the same standards) there may be no restrictive effects on competition. Also, if in the absence of a limitation on the number of participants it would not have been possible to adopt the standard, the agreement would not be likely to lead to any restrictive effect on competition under Article 101(1) (121). In certain situations the potential negative effects of restricted participation may be removed or at least lessened by ensuring that stakeholders are kept informed and consulted on the work in progress (122). The more transparent the procedure for adopting the standard, the more likely it is that the adopted standard will take into account the interests of all stakeholders. 296. To assess the effects of a standard-setting agreement, the market shares of the goods or services based on the standard should be taken into account. It might not always be possible to assess with any certainty at an early stage whether the standard will in practice be adopted by a large part of the industry or whether it will only be a standard used by a marginal part of the relevant industry. In many cases the relevant market shares of the companies having participated in developing the standard could be used as a proxy for estimating the likely market share of the standard (since the companies participating in setting the standard would in most cases have an interest in implementing the standard) (123). However, as the effectiveness of standardisation agreements is often proportional to the share of the industry involved in setting and/or applying the standard, high market shares held by the parties in the market or markets affected by the standard will not necessarily lead to the conclusion that the standard is likely to give rise to restrictive effects on competition. 297. Any standard-setting agreement which clearly discriminates against any of the participating or potential members could lead to a restriction of competition. For example, if a standard-setting organisation explicitly excludes upstream only companies (that is to say, companies not active on the downstream production market), this could lead to an exclusion of potentially better technologies. 298. As regards standard-setting agreements with different types of IPR disclosure models from the ones described in paragraph 286, it would have to be assessed on a case by case basis whether the disclosure model in question (for example a disclosure model not requiring but only encouraging IPR disclosure) guarantees effective access to the standard. In other words, it needs to be assessed whether, in the specific context, an informed choice between technologies and associated IPR is in practice not prevented by the IPR disclosure model.	

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299. Finally, standard-setting agreements providing for ex ante disclosures of most restrictive licensing terms, will not, in principle, restrict competition within the meaning of Article 101(1). In that regard, it is important that parties involved in the selection of a standard be fully informed not only as to the available technical options and the associated IPR, but also as to the likely cost of that IPR. Therefore, should a standard-setting organisation's IPR policy choose to provide for IPR holders to individually disclose their most restrictive licensing terms, including the maximum royalty rates they would charge, prior to the adoption of the standard, this will normally not lead to a restriction of competition within the meaning of Article 101(1) (124). Such unilateral ex ante disclosures of most restrictive licensing terms would be one way to enable the standard-setting organisation to take an informed decision based on the disadvantages and advantages of different alternative technologies, not only from a technical perspective but also from a pricing perspective.	
7.4. Assessment under Article 101(3)	
7.4.1. Efficiency gains	
Standardisation agreements 308. Standardisation agreements frequently give rise to significant efficiency gains. For example, Union wide standards may facilitate market integration and allow companies to market their goods and services in all Member States, leading to increased consumer choice and decreasing prices. Standards which establish technical interoperability and compatibility often encourage competition on the merits between technologies from different companies and help prevent lock-in to one particular supplier. Furthermore, standards may reduce transaction costs for sellers and buyers. Standards on, for instance, quality, safety and environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality. Standards also play an important role for innovation. They can reduce the time it takes to bring a new technology to the market and facilitate innovation by allowing companies to build on top of agreed solutions. 309. To achieve those efficiency gains in the case of standardisation agreements, the information necessary to apply the standard must be effectively available to those wishing to enter the market (126). 310. Dissemination of a standard can be enhanced by marks or logos certifying compliance thereby providing certainty to customers. Agreements for testing and certification go beyond the primary objective of defining the standard and would normally constitute a distinct agreement and market. 311. While the effects on innovation must be analysed on a case-by-case basis, standards creating compatibility on a horizontal level between different technology platforms are considered to be likely to give rise to efficiency gains.	
7.4.2. Indispensability	

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314. Restrictions that go beyond what is necessary to achieve the efficiency gains that can be generated by a standardisation agreement or standard terms do not fulfil the criteria of Article 101(3). ***Standardisation agreements*** 315. The assessment of each standardisation agreement must take into account its likely effect on the markets concerned, on the one hand, and the scope of restrictions that possibly go beyond the objective of achieving efficiencies, on the other (127). 316. Participation in standard-setting should normally be open to all competitors in the market or markets affected by the standard unless the parties demonstrate significant inefficiencies of such participation or recognised procedures are foreseen for the collective representation of interests (128). 317. As a general rule standardisation agreements should cover no more than what is necessary to ensure their aims, whether this is technical interoperability and compatibility or a certain level of quality. In cases where having only one technological solution would benefit consumers or the economy at large that standard should, be set on a non-discriminatory basis. Technology neutral standards can, in certain circumstances, lead to larger efficiency gains. Including substitute IPR (129) as essential parts of a standard while at the same time forcing the users of the standard to pay for more IPR than technically necessary would go beyond what is necessary to achieve any identified efficiency gains. In the same vein, including substitute IPR as essential parts of a standard and limiting the use of that technology to that particular standard (that is to say, exclusive use) could limit inter-technology competition and would not be necessary to achieve the efficiencies identified. 318. Restrictions in a standardisation agreement making a standard binding and obligatory for the industry are in principle not indispensable. 319. In a similar vein, standardisation 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. The exclusivity can, however, be justified for a certain period of time, for example by the need to recoup significant start-up costs (130). The standardisation agreement should in that case include adequate safeguards to mitigate possible risks to competition resulting from exclusivity. This concerns, inter alia, the certification fee which needs to be reasonable and proportionate to the cost of the compliance testing.	
7.4.3. Pass-on to consumers	
Standardisation agreements 321. Efficiency gains attained by indispensable restrictions must be passed on to consumers to an extent that outweighs the restrictive effects on competition caused by a standardisation agreement or by standard terms. A relevant part of the analysis of likely pass-on to consumers is which procedures are used to guarantee that the interests of the users of standards and end consumers are protected. Where standards facilitate	

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technical interoperability and compatibility or competition between new and already existing products, services and processes, it can be presumed that the standard will benefit consumers.	
7.4.4. No elimination of competition	
324. Whether a standardisation agreement affords the parties the possibility of eliminating competition depends on the various sources of competition in the market, the level of competitive constraint that they impose on the parties and the impact of the agreement on that competitive constraint. While market shares are relevant for that analysis, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share except in cases where a standard becomes a de facto industry standard (131). In the latter case competition may be eliminated if third parties are foreclosed from effective access to the standard. …	-
7.5. Examples	
[…]	