

## STANDARDISING THE STANDARDISATION PROCESS – AN UPDATE ON STANDARDS, COMPETITION, AND INNOVATION IN EUROPE

The use of standards in high technology sectors, such as in the ICT and network industries, has facilitated a new level of dynamism and innovation in technological development. Indeed, the acceleration in technology associated with the use of standardisation has impacted on the entire industry, at once enabling and driving companies to keep up with the pace of technological change.

As a previous Stockholm Network briefing paper on standards discussed,<sup>1</sup> the current standardisation process relies on a range of channels to establish standards, whether it be through a dominant product or protocol; a formal national or regional standard-setting organisation (SSO); or an informal industry consortium. As technology intensifies, the range and the number of channels or actors involved in standardisation are expanding. In particular, more non-traditional entities, including international fora and consortia, such as the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C) and the Organization for the Advancement of Structured Information Standards (OASIS), are producing widely implemented specifications. In addition, there is greater demand for accessing standards among different implementers or end-users, including SMEs.

This briefing paper will discuss the impact of the changing environment for standardisation, particularly in Europe, and assess four new proposals for adapting the existing framework for standard setting in the EU.

### INTELLECTUAL PROPERTY RIGHTS IN THE CONTEXT OF INCREASED STAKEHOLDERS

With an increased number of actors in the standard-setting process comes the need for greater collaboration among all of these actors. Policymakers and stakeholders have sought to facilitate improved co-ordination, and even harmonisation, among formal SSOs and informal entities, with the goal of sharing standards and achieving greater interoperability between different technology platforms. Enhancing collaboration and the speed of standard-setting raises several challenges associated with co-ordinating the different technical and business approaches of the various entities participating in the standard-setting process, including the co-ordination of diverse policies on intellectual property rights (IPRs).

The use of IPRs to transfer knowledge is one way that standards may be diffused to implementers and end-users. For standards based on, or involving, IPRs, these rights are viewed as providing an important incentive for companies to invest in the creation of new standards and to transfer new technologies to entities which will develop them further. This is especially the case for companies in the ICT and network industries, which often develop technologies rather than a full product.<sup>2</sup> However, in some cases, IPRs may be viewed as barriers to accessing essential standards, especially for SMEs and end-users in developing countries. Stakeholders seeking to improve the efficiency of the standardisation process may also view those IPRs that are not disclosed prior to being included in a formal standard as a hindrance to the process. Indeed, with the anticipated increase in the harmonization of patenting activities in the EU, the drive for transparency and

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<sup>1</sup> Stockholm Network, “Standards, Competition and Innovation”, 2010, [http://www.stockholm-network.org/downloads/publications/Standards\\_Polybrief.pdf](http://www.stockholm-network.org/downloads/publications/Standards_Polybrief.pdf).

<sup>2</sup> For more information on IPRs and standards, see the aforementioned Stockholm Network Polybrief, “Standards, Competition and Innovation”.

disclosure is likely to increase in Europe. In particular, in the context of reduced costs of translation and an EU patent court,<sup>3</sup> IPRs may become an even stronger force in European level standardisation efforts.

Therefore, policymakers and stakeholders have sought to streamline and harmonise the IP policies of different standard-setting organisations, including the approach to accessing new standards as well as to implementing these standards. In some cases, this may even involve requiring standards creators to conform to certain conventions on the formation and management of IPRs. It could also involve the use of public procurement policies to promote one standard over another.

Thus, the use and management of IPRs in the standardisation process constitutes an important topic in the discussion on co-ordinating standardisation efforts, especially as more and more stakeholders with different approaches to accessing and sharing standards become involved. For instance, the incorporation of a greater number of stakeholders who tend to operate on royalty-free sharing of specifications (including some fora and consortia) may conflict with more traditional IP or FRAND-based approaches.<sup>4</sup>

Still, we should not forget that IPRs are just one of several factors that impact on the manner, cost and time within which standards are made available to different end-users. Other factors may include the number of stakeholders seeking to access a proprietary standard and the technical know-how required to implement the specifications included in a standard.

## NEW POLICY APPROACHES

Policymakers are struggling globally to address these challenges and maintain an effective standard-setting environment, whilst also assessing the appropriate role of government and public bodies in co-ordinating standard-setting processes. Indeed, over the last year several discussions have taken place within Europe, both at the EU and national levels, including in the context of EU legislation seeking to update the European framework for standardisation.<sup>5</sup> The past year has seen at least four studies and reports by EU bodies, including the EXPRESS committee, the European Parliament and DG Enterprise.

### The EXPRESS Committee – *Standardization for a Competitive and Innovative Europe: a Vision for 2020* (February 2010)

The report was prepared by the Expert Panel for the Review of the European Standardization System (EXPRESS), composed of 30 experts from a range of bodies involved in standard-setting, including national, international and EU-level SSOs, industry, NGOs and academia. The panel based their findings and recommendations on a two-month public consultation in 2009 of stakeholders around the world. The report identifies 12 strategic goals and recommendations for modernising the European framework for standardisation, including optimising the effects of globalisation, improving access to standards and standard-setting and reforming the legal framework governing standards in public use.<sup>6</sup>

### DG Enterprise – *Public Consultation on Standardisation Package: Overview of the Responses* (June 2010)

This consultation was carried out in 2010 with a view to assessing the current functioning of the European Standardisation System and raising possible improvements. It involved responses from a range of

<sup>3</sup> Europa, "Patents: Commission proposes translation arrangements for future EU Patent", Europa Press Release, 1 July 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/870&type=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>4</sup> FRAND refers to accessing standards on free, reasonable and non-discriminatory terms.

<sup>5</sup> See DG Enterprise and Industry, "European standards: Public consultation on the review of the European Standardisation System, 2010, [http://ec.europa.eu/enterprise/policies/european-standards/public-consultation/index\\_en.htm](http://ec.europa.eu/enterprise/policies/european-standards/public-consultation/index_en.htm).

<sup>6</sup> DG Enterprise and Industry, "European standards: the Expert Panel for the Review of the European Standardisation System (EXPRESS), 2010, [http://ec.europa.eu/enterprise/policies/european-standards/standardisation-policy/policy-review/express/index\\_en.htm](http://ec.europa.eu/enterprise/policies/european-standards/standardisation-policy/policy-review/express/index_en.htm).

stakeholders including companies, industry associations, public authorities and European and National Standards Bodies. The report highlights respondents' support for preserving the national delegation principle (which aims to ensure fair representation in national committees) and raised concerns about opening up the standardisation process to new players, such as fora and consortia.<sup>7</sup> Furthermore, it indicates the need to improve the accessibility of standards, including in terms of cost.

European Parliament – Report on the Future of European Standardization (August 2010)

The report, developed by the Internal Market and Consumer Protection Committee, aims to provide strategic direction for potential European legislation on standard-setting. The European Parliament plenary approved the document on 21 October 2010. This study is based on, among other evidence, the findings of the EXPRESS report as well as the EU White paper from July 2009, *Modernising ICT Standardisation in the EU – the Way Forward*.

The report supports a review of the European standardisation system and encourages the Commission to rapidly submit a proposal for “a modern, integrated standardisation policy”.<sup>8</sup> It recommends that such efforts maintain the core values of the current system of European standardisation (such as the principle of national delegation), whilst incorporating certain additional components that would allow the system to adapt to the changing environment for standardisation.

In particular, the report recommends improving the system for co-ordinating standardisation activities among different bodies, including increasing stakeholder involvement in forming industry-specific government policies on standardisation (which would direct the activity of European SSOs) and integrating previously neglected stakeholders into the standardisation process. Above all, it suggests that the process involve a more “appropriate representation” of stakeholders, specifically recommending that SMEs and user-based entities (i.e. fora and consortia), including those from emerging economies such as India and China, have greater input in determining standards. In addition, this study recommends updating the legal framework for the use of standards in references to specifications in legislation or in public procurement, especially standards developed in the scope of international consortia.

DG Enterprise – Study on the Interplay between Standards and Intellectual Property Right (ongoing 2010)

Building on its previous efforts, DG Enterprise commissioned Fraunhofer FOKUS to carry out a fact-finding study throughout 2010 on the specific topic of IPRs in the standardisation process. The study includes interviews and surveys of stakeholders involved in the elaboration and use of standards. Most recently, the European Commission and the European Patent Office organised an event and workshop exploring the issues of the study. The central issues raised in the discussion relate to standardising and publishing patent specifications or licensing terms *ex ante* in order to facilitate access to standards by different players and in order to increase transparency of standard-setting processes.

The discussion also explored the role of EU legislation and public procurement policies in promoting increasingly open standards, with the goal of finalising a set of EU guidelines by the end of 2010. Furthermore, it included the idea that such guidelines would seek to create a framework that would promote good faith disclosure of licensing terms, including *ex ante*, however not on a mandatory basis.

<sup>7</sup> DG Enterprise and Industry, *Public Consultation on Standardisation Package: Overview of the Responses*, 2010, [http://ec.europa.eu/enterprise/policies/european-standards/files/public-consultation/overview\\_results\\_public\\_consultation\\_en.pdf](http://ec.europa.eu/enterprise/policies/european-standards/files/public-consultation/overview_results_public_consultation_en.pdf).

<sup>8</sup> European Parliament, The Legislative Observatory, INI/2010/2051, 2010, <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2010/2051>. See also, European Parliament, Committee on the Internal Market and Consumer Protection, *Draft Report on the Future of European Standardisation (2010/2051 (INI))*, 2010, <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE442.975>.

Indeed, Commission representatives emphasised that the goal was to find a compromise between the interests of rights holders and implementers.

## COMMON THEMES

Among the four reports, several common themes have emerged, which are likely to play a large part in any forthcoming EU legislation on the European standardisation system.

Generally speaking, policymakers are seeking to promote increased access to standards at a reduced cost to implementers. This includes improving information related to each standard, especially those based on IPRs, earlier in the standardisation process and at a lower cost. It also includes expanding the number of stakeholders involved in establishing standards.

Indeed, on the whole, policymakers seem to support including more user-based entities, such as fora and consortia, in formal standard-setting efforts. Nonetheless, they recognise the challenge of balancing the different business models of newcomers with the models of rights holders. The possibility of accommodating models of open and royalty-free access in existing standards agreements is certainly on the negotiating table.

Finally, policymakers are increasingly seeking to establish these objectives formally via guidelines directed at European standard-setting bodies and public procurement processes. For instance, this may include guidelines on setting licensing terms and publicising IPRs related to ICT standards.

## CONCLUSION

The policy efforts discussed here reflect the ever-deepening complexity of technology and, consequently, heightened participation in elaborating and sharing standards. While these are both positive trends, the tendency among policymakers and stakeholders in this context is towards greater involvement in coordinating and, in some cases, harmonising the standardisation process, including via public policy.

Greater collaboration among different actors involved in the standardisation process is welcome, but such efforts do not need to be formalised to the extent that they discriminate against one form of standard development or another, including traditional IPRs, FRAND or open source-based standards. Certainly, it is overreaching for governments to promote certain modes of standard development in legislation and public procurement policies at the risk of distorting the market.

Such “standardisation of the standardisation process” may stifle market-based solutions to the challenges facing modern standardisation. Indeed, approaches to IPRs vary among different entities involved in standardisation for a reason – each approach is tailored to the particular market context of the standard in question. Stakeholders, and even national governments, must be free to decide the best channel and conditions for developing and accessing standards on a case-by-case basis. In this light, policymakers should take a balanced, collaborative approach toward building a framework that facilitates all players in the standardisation process in order to create the most competitive and dynamic ICT marketplace possible.