



European Commission

Competition

Brussels Matters

15 October 2009

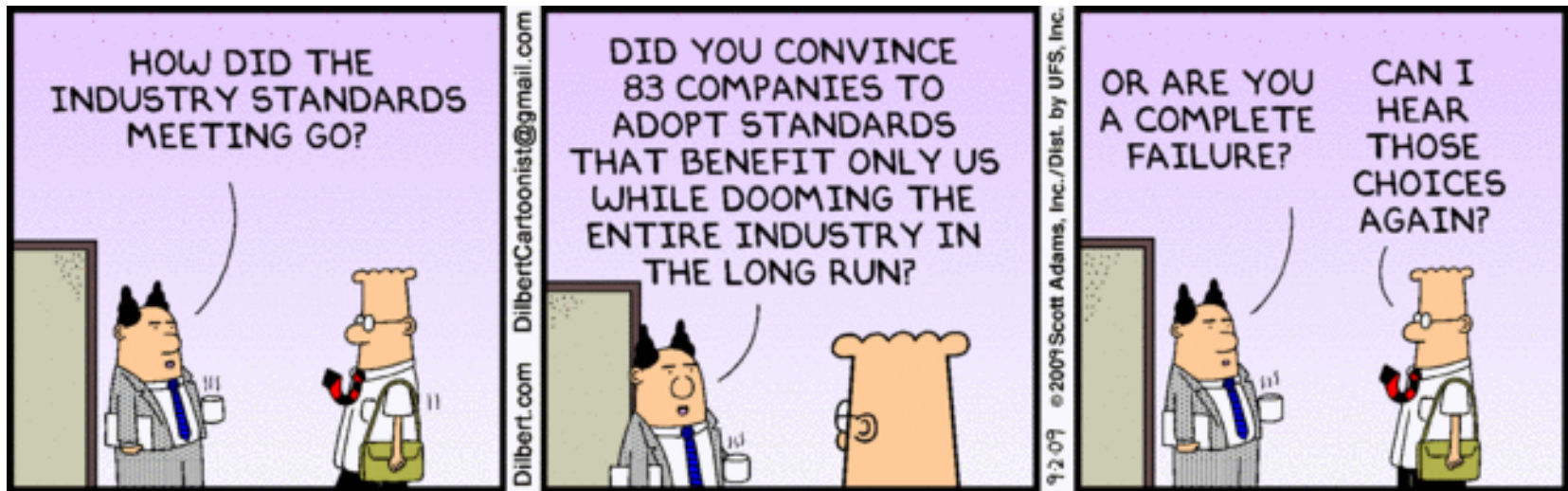
Patents, standards and anti-trust

Per Hellström

(Speaking in a personal capacity – the views expressed are not necessarily those of the European Commission)



The importance of standards





Overview

- Economic and Legal Framework
- Standards and market power
- Patent ambush
- *Ex ante/ex post* pricing
- Transferability of commitments
- Conclusion



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THE ECONOMIC AND LEGAL FRAMEWORK



Cost-benefit analysis (Carl Shapiro)

- Costs
 - Potential limitations in product variety
 - Potential market power of company controlling a standard
- Benefits
 - Open standards provide certainty
 - Network effects



Commission's approach

- Recognises the benefits of standardisation
 - Commission Communication
 - Horizontal Anti-Trust Guidelines
- Subject to conditions
 - Transparency of process
 - No restrictions that are not indispensable
 - Available to all who wish to enter



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STANDARDS AND MARKET POWER



Do standards confer market power?

- Possibly
 - Depends on importance of standard in market
 - Depends on lock-in (sunk costs, network effects)
- What are the implications for the price?



Do standards confer ‘incremental’ market power?

- Possibly
 - Depends on *ex ante* alternatives
- What would have happened *ex ante* is a good benchmark
- Disclosure of IPR and FRAND commitment



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PATENT AMBUSH



Patent ambush (I)

- Non-disclosure of essential patents/patent applications during standardisation
- Prevents competition on the merits
- Allows *ex post* monopoly price to be charged
 - May not have otherwise been the case
- How might specific patent ambush cases be dealt with?



Patent ambush (II)

- Prevention better than cure
- Encourage standards bodies to have clear rules
- ETSI



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EX ANTE/EX POST PRICING



What is FRAND?

- Aims to constrain *ex post* price
 - Given prospect of market power which otherwise would not have occurred
- How do you measure FRAND?
 - Is *ex ante* a good benchmark?
- Role of FRAND in competition analysis



Ex ante régime (I)

- Potentially economically more efficient
- Prices announced/set before standard is agreed
- Allows competition on both price and technology
- Uniquely innovative technologies will always be appropriately valued



Ex ante régime (II)

- US Business Review Letters
- EU Technology Transfer Guidelines
- Role of anti-trust agencies should not be prescriptive as regards choice of scheme



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TRANSFERABILITY OF COMMITMENTS



Transferability of commitments

- Company gives (FRAND) commitment to SSO
- Sells essential patent rights to another company
- Does the commitment oblige the new owner?
- How does competition analysis take this into account?
- What role does the SSO have?



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CONCLUSION



Conclusion

- Benefits of standardisation recognised
 - But the context is important
- Ideally, competition authority does not want to intervene in individual cases
- Important for standards bodies to design the most efficient rules



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