



**Non-Confidential Version**

16 February 2009

Google Inc. ("Google") welcomes the opportunity to contribute to the public consultation on the functioning of the R&D and Specialisation Block Exemption Regulations and the Horizontal Guidelines.

**The R&D and Specialisation Block Exemption Regulations deal with joint R&D agreements and specialisation as well as joint production agreements respectively. The Horizontal Guidelines cover the following forms of cooperation between competitors: (i) R&D agreements; (ii) production and specialisation agreements; (iii) purchasing agreements; (iv) commercialisation agreements; (v) agreements on standards; and (vi) environmental agreements.**

**1. For each of the topics referred to above, please report any major problems raised by the application of the Specialisation and R&D Block Exemption Regulations and the Horizontal Guidelines. Please indicate also the sector in which such problems were encountered and the type of solution found, if any, to address the problems and results obtained.**

To-date, Google has not encountered any major problems raised by the application of the Specialisation or R&D Block Exemption Regulations or the Horizontal Guidelines. As set out below, however, Google considers that there are areas where additional guidance would be helpful in order to avoid major problems in the future.

**2. For each of the topics referred to above, please report the competition issues in relation to which you found that the application of the Specialisation and R&D Block Exemption Regulations and the Horizontal Guidelines have proven to be very useful in order to protect competition.**

Competition law compliance is a high priority for the majority of companies – not least because of the high fines that are imposed for infringements at the Member State and EC level. When Regulation 1/2003 rendered Article 81(3) directly applicable, self-assessment of compliance with competition rules therefore became an important part of day-to-day business activity in the EC. Since in-house lawyers often have the best understanding of a company's business and competitive environment and are more cost-effective than external lawyers (particular for ad hoc practical business advice), the new system of self-assessment has inevitably led to many companies employing in-house competition lawyers (and a reduction in the volume of work that is out-sourced to external lawyers). An in-house competition lawyer will typically advise mainly on the application of competition rules to new business propositions and contractual obligations. Google believes that, where available, legal professional privilege ("LPP") has to great extent facilitated the shift from external counsel to internal counsel ensuring companies' day-to-day compliance with EC competition rules.<sup>1</sup>

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<sup>1</sup> It should be noted that competition authorities in countries that do recognize LPP for in-house lawyers are not less effective than those that don't. For example, there is no correlation between the number of cartels detected and investigated and the question of LPP. For example, Austria, Italy, Poland, and Sweden are investigating less alleged antitrust violations than the UK (which only recently increased its activities as a policy matter), see <http://ec.europa.eu/comm/competition/ecr/statistics.html#2>.

The fact that the Commission refuses to recognize LPP for in-house (and non-EEA<sup>2</sup>) lawyers shows that the Commission does not appreciate fully or at all the important role that in-house legal advice plays in ensuring day-to-day compliance with competition rules.<sup>3</sup> An unfortunate side-effect of the Commission's approach to LPP, is that in-house lawyers cannot provide advice without first assessing the risk of being ordered to disclose such advice in future EU proceedings. This burden reduces the amount and/or quality of advice that in-house lawyers can give to the business (e.g., in fast moving contract negotiations). Granting LPP to in-house counsel would (1) show that the Commission values the assistance of in-house advisers and encourage companies to invest in these resources and (2) free up in-house lawyers to focus on ensuring compliance with competition rules, safe in the knowledge that their advice is as privileged as that of their private practice peers.

Despite the disadvantages of the current EU rules on LPP, Google considers that the Specialisation and R&D Block Exemption Regulations and Horizontal Guidelines provide useful substantive guidance for in-house counsel. In particular, Google thinks that these documents are helpful for assessing market power since they advocate, to a large extent, an effects-based approach taking into account actual market conditions such as expansion and entry barriers, the countervailing power of buyers/suppliers, and the nature of the products in question.

**3. According to your experience, do you consider that some of the provisions in the current Specialisation and R&D Block Exemption Regulations and/or parts of the text of the Horizontal Guidelines have become unsatisfactory in order to address issues inherent to the economic developments that have taken place at the national and European level? Please provide reasons for your response.**

Google sets out below its thoughts regarding areas of the current Specialisation and R&D Block Exemption Regulations and Horizontal Guidelines that it considers to be unsatisfactory:

- **Insufficient explanations that most agreements are unproblematic bar unusual circumstances.** As mentioned above, the Specialisation and R&D Block Exemption Regulations and Horizontal Guidelines all provide useful substantive guidance for in-house counsel. There is, however, a risk that these documents may give the (false) impression to generalist lawyers that restrictions in agreements are *prima facie* problematic unless they fall into an expressly exempted category. Intervention in agreements based on Article 81(1) is the exception not the rule. We think that there would be significant benefit in conveying the message more clearly that most agreements are unproblematic bar unusual circumstances.<sup>4</sup> Indeed, this would also reflect more accurately the fact that the Commission (or a plaintiff in a private lawsuit) bears the burden of proof when alleging a violation of Article 81(1). Google is particularly concerned that while the Commission is undoubtedly sophisticated and rigorous in its analysis, the same may not be true for courts and some national Competition Authorities ("NCAs").
- **Block Exemption market share thresholds too low.** Google suggests that the market share thresholds of 20% and 25%, in the Specialisation Block Exemption and R&D Block Exemption respectively, may be too low, since agreements with higher

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<sup>2</sup> Given the international scope of competition laws, and the level of cooperation between competition authorities, Google considers that no distinction should be made on the basis of the lawyers' origin.

<sup>3</sup> In addition, some countries such as Germany even deny, to a large extent, LPP to outside counsel unless criminal proceedings have been initiated.

<sup>4</sup> The change in tone that Google suggests could also be incorporated into the revision of the current Notice on the application of Article 81(3) of the Treaty. This revision would be particularly useful for Internet companies that by definition operate on a pan-European (or even global) scale and operate in a very dynamic market with high rates of innovation and constantly changing business models, where foreclosure concerns are very limited (as recognized by the Commission in its recent *Google/DoubleClick* Decision).

combined markets shares will often not fall under Article 81(1) or will be exempted under Article 81(3). Further, Google suggests that the two-year and one-year time-limits that activate for specialization agreements when market shares exceed 20% (but not 25%) and 25% should not apply when market shares drop back below 20% or 25% during the relevant time-period (i.e., the exemption should only expire when the relevant market share threshold is exceeded throughout the entire one or two year period). This approach would avoid disadvantaging companies that benefit from an atypical and short-lived uplift in sales (e.g., caused by a malfunction in a rival's production line).

- **Purchasing agreements between small and medium-sized enterprises (“SMEs”) appear to benefit from a presumption of pro-competitive effects.** The Horizontal Guidelines say that purchasing agreements between SMEs are “*normally pro-competitive*” (para. 116). We fear that generalist lawyers or NCAs could misinterpret this statement as implying that such a presumption does not apply to purchasing agreements involving non-SMEs. We think, therefore, that it would be helpful to note that (a) most agreements are unproblematic bar unusual circumstances and (b) the size of the undertakings in question is not determinative in the assessment of the effects on competition of a particular purchasing agreement.<sup>5</sup>
- **Block exemptions and Horizontal Guidelines need to be revised to include recent case-law and updated examples.** As mentioned above, Google considers that the Specialisation and R&D Block Exemption Regulations and Horizontal Guidelines provide useful substantive guidance for in-house counsel. We consider, however, that these publications should be updated to include new case-law and examples (e.g., relating to new dynamic online industries with high rates of innovation and constantly changing business models). Updated guidance would hopefully avoid, or reduce the likelihood of, EU Member States developing diverging views on how to assess horizontal agreements. In this regard, we note the widening gap between the application of the Merger Control Regulation – which continues to result in a large body of published, reasoned decisions – and Article 81 of the Treaty.<sup>6</sup>

**4. In light of the changes that you deem likely to occur in the European economies, do you believe that there are any specific horizontal competition “issues” not currently addressed by the current Specialisation and R&D Block Exemption Regulations or Horizontal Guidelines and that should be considered in the review (e.g., information exchange)? Please provide reasons for your response.**

Google considers that more complete guidance on the application of competition rules to information exchange would certainly be helpful. We note that the Commission has recently dealt with this type of agreement in some depth for the benefit of undertakings active in the maritime industry.<sup>7</sup>

We consider that the current guidance in this area is dated and opaque. In particular, the guidance that is currently available is of little assistance to companies active in high-tech industries where a huge amount of different types of data is available, often in real-time. In this

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<sup>5</sup> Google's observation should not be read as implying that it sees no place for a *de minimis* exception in the assessment of horizontal agreements. Google considers that the *de minimis* exception is a useful tool for self-assessment, but objects to any implication that large undertakings are a priori subject to more stringent scrutiny than SMEs purely on grounds of size. Google notes that the protection of SMEs (rather than consumer welfare) could lead to a reduction in competition.

<sup>6</sup> To a large extent, this problem could be mitigated if the long-standing promise of the Commission to ensure publication of all national court cases and NCA decisions in a central searchable database were acted upon. The currently available “database” is however, largely unhelpful. In fact, this “database” appears to be a repository without structure, where courts simply “dump” cases at random.



<sup>7</sup> See, Guidelines on the application of Article 81 of the EC Treaty to maritime transport services.

context, it would be useful to have more examples of the categories of data that should not be exchanged with competitors.

We are particularly concerned that the lack of clear guidance in this area will lead to a divergence in the way that NCAs and courts assess information exchange agreements.<sup>8</sup> We therefore strongly encourage the Commission to provide further guidance on these types of horizontal agreements.

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We hope that the above is helpful and stand ready to provide additional assistance, if required.

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<sup>8</sup> We understand that there have been recent cases in Germany, France, and Finland where infringements of competition law were established purely on grounds of illegal information exchange.