

Comments
by the Federal Ministry of Economics and Technology
and the Federal Cartel Office
on the draft Commission Regulations on the application of Article 101 (3) of the
Treaty on the Functioning of the European Union to categories of research and
development agreements (R&D BER) and to categories of specialisation
agreements (Specialisation BER)
and on the draft guidelines on the applicability of Article 101 of the Treaty on
the Functioning of the European Union to horizontal co-operation agreements
(Horizontal Guidelines)

1. General remarks

The Federal Ministry of Economics and Technology (BMW_i) and the Federal Cartel Office (BKartA) welcome the European Commission's submission of drafts revising the R&D BER, the Specialisation BER and the Horizontal Guidelines, and are pleased to take the opportunity to comment on these texts.

The currently applicable rules on agreements between undertakings operating at the same market level have proven to be effective in practice. For this reason, it makes sense that the submitted drafts retain the basic structure and substance of the existing provisions. With the exception of the draft Horizontal Guidelines, which have been substantively revised and supplemented, the drafts modify only specific details. The BMW_i and BKartA support this approach by the European Commission. We also welcome the substantive modifications contained in the draft Horizontal Guidelines. The rules on horizontal agreements play a very important role in shaping a large number of various co-operative arrangements between competing undertakings. R&D co-operation in particular takes many different forms. The rules on horizontal agreements provide the affected companies with guidance within the legal exception system, whether competition provisions rule out the desired contractual arrangement. The BMW_i and BKartA are convinced that the submitted drafts fulfil these functions as well.

The draft Horizontal Guidelines contain a new chapter on information exchanges between competitors. The chapter on standardisation agreements was revised extensively. At this time, the BMWi and BKartA will restrict their comments to these two chapters. We reserve the right to submit subsequent comments, including and particularly on issues that arise during the consultation process.

2. Information exchanges between competitors

The BMWi and BKartA welcome the addition of the new chapter on information exchange in the Horizontal Guidelines. By adding this chapter, the European Commission is satisfying a widespread interest – shared by many German actors – in receiving guidance in this area. Internal company information and market-specific information are key components and channels within the competitive process. However, the sharing of such information can be conducted with the purpose of eliminating competition or can have the effect of restricting competition. The BMWi and BKartA agree with the draft Horizontal Guidelines' basic differentiation between (i) the exchange of information on intended future conduct regarding prices or quantities, which constitutes "restrictions of competition by object" and (ii) the exchange of other competitively important information that can have "restrictive effects on competition".

In some cases, co-operation is limited to the exchange of information as such. Apart from that, however, in most types of co-operation between competitors, the exchange of competitively important market information takes place in connection with such activities as joint purchasing or joint marketing efforts. In the view of the BMWi and BKartA, the purpose and effect of information exchanges as part of the co-operation should be taken sufficiently into account during the assessment of the co-operation agreement in accordance with Article 101 TFEU. It is only through a type of comprehensive perspective that all of the co-operation's possible restrictive effects on competition can be appropriately assessed.

3. Standardisation agreements

The Horizontal Guidelines' chapter on standardisation agreements is divided into sections on "standardisation agreements" involving economic goods and "standard terms". At this time, the BMWi and BKartA will restrict their comments to standardisation agreements.

Standards can facilitate the penetration of the internal market, the development of new markets, quality enhancement and interoperability. The draft concentrates on the European Commission's practical findings resulting from the *Rambus*, *Qualcomm* and *IP.COM* proceedings with respect to competition concerns involving intellectual property rights that are essential to a standard. The BMWi and BKartA support this practice-based approach.

The Horizontal Guidelines view compliance with certain recognised principles during the standardisation process as a "safe harbour" in assessments of restrictive effects on competition in accordance with Article 101 (1) TFEU. These principles are meant above all to safeguard competition involving the technologies and solutions that are incorporated into the standard. Among other things, standard-setting organisations are to establish rules for their members that prevent intellectual property rights from being "smuggled" into standards and that prevent abusive royalty rates when such IPR are incorporated into a particular standard. These two circumstances are closely connected to the abuse of market power as prohibited under Article 102 TFEU. Given the legitimacy of efforts to prevent such abuses of market power during the standardisation process, the BMWi and BKartA view the incorporation of such rules in the Horizontal Guidelines to Article 101 TFEU as appropriate.

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